22-604

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 528.

JOHN M. BAILEY, LATE COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

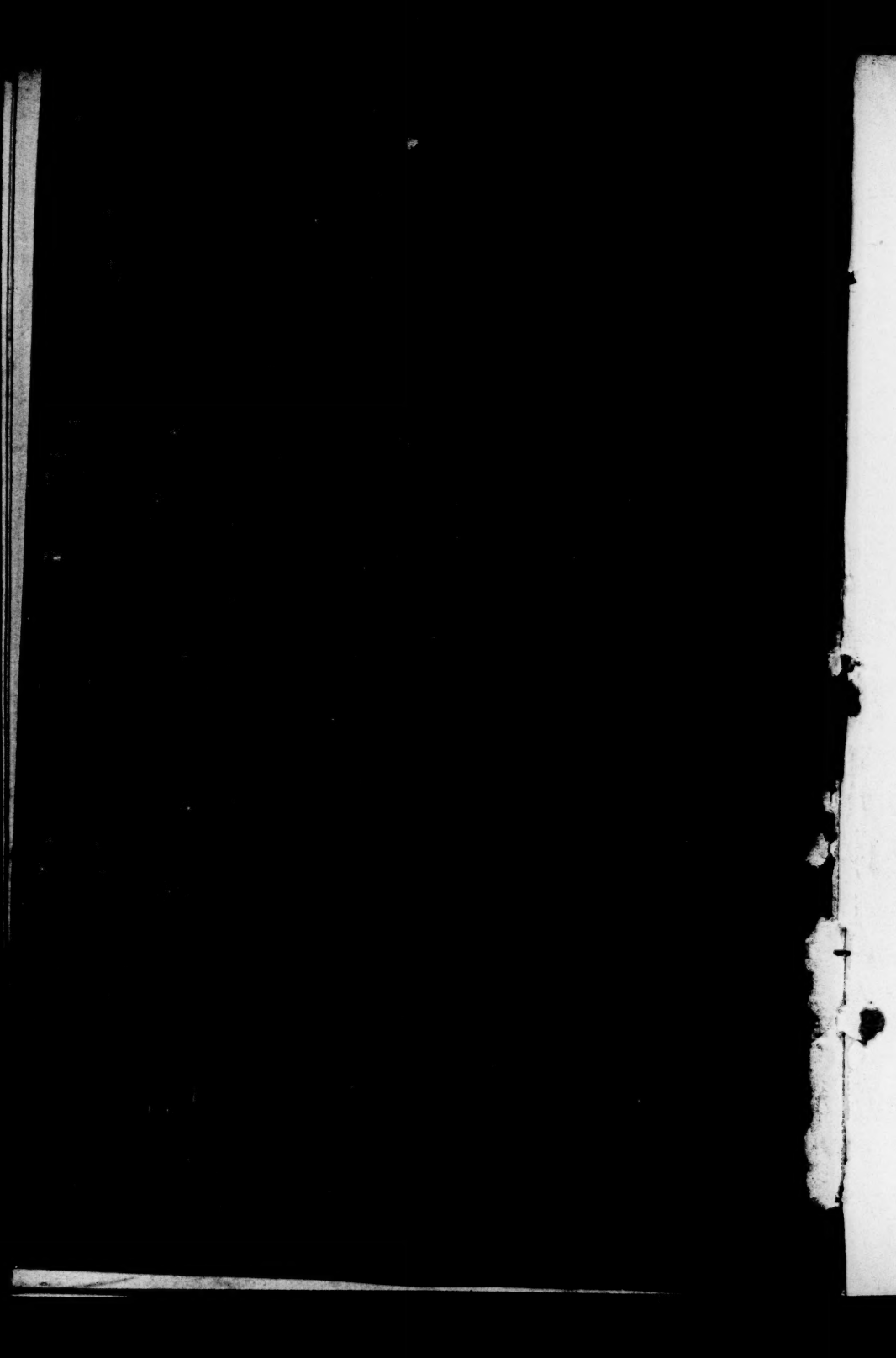
vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 29, 1874.

Oct. Term, 1874



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1 To the honorable the circuit court of the United States for the northern district of New York:

The petition of John M. Bailey, of Albany, in the county Albany and State of New York, respectfully shows:

That from the first day of December, A. D. 1869, until the 20th day of May, A. D. 1873, your petitioner was an officer of the United States, to wit: collector of internal revenue for the 14th collection district of New York, duly appointed under and acting by authority of an act of Congress entitled "An act to provide internal revenue to suport the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, and the several acts amendatory thereof and in addition thereto.

That on the 23rd day of May, 1873, at Albany, within said district and within the jurisdiction of this court, your petitioner was personally served with a summons and complaint issued out of the supreme court of the State of New York, wherein the New York Central and Hudson River Railroad Company is named as plaintiff and your petitioner as defendant; that by such service a suit and prosecution has been commenced in said supreme court of the State of New York against your petitioner, and that the venue of said action is the county of Albany, in said district.

And your petitioner further shows that the grounds of such suit and prosecution, as stated in said complaint, are: that your petitioner demanded of said plaintiff the sum of $462,720, under a certain assessment against the New York Central Railroad Company, and for the purpose of collecting the same your petitioner did unlawfully and without authority seize and sell, on the 22nd day of March, 1873, seventeen locomotive engines and tenders belonging to the plaintiff, and re-

2 ceive therefor on such sale the sum of $17,000; that your petitioner afterwards, for the purpose of collecting said tax, seized unlawfully, and without authority, eight other locomotive engines and tenders, also belonging to the plaintiff, and on the 23rd day of April, 1873, sold the same, and received therefor the sum of $27,750; that your petitioner afterwards, for the purpose of collecting said tax, unlawfully seized twenty-three other locomotive engines and tenders, thirty-six passenger coaches, and three baggage-cars, all the property of the plaintiff, and threatened to sell the same and to seize and sell other property of the plaintiff, and to harrass, annoy, and irreparably injure the plaintiff in its business and affairs for the purpose of collecting said assessment of $462,720; that said plaintiff, for the purpose of avoiding the sacrifice of its property and the damage threatened as aforesaid by your petitioner to the property, business, and affairs of the plaintiff, *said plaintiff* paid to your petitioner, under duress and protest, on the 13th day of May, 1873, the sum of $446,270.12, and on the 19th day of May, 1873, the further sum of $64,153.48, and that said payments were accompanied with written protests delivered to your petitioner at the times of said payments respectively. Wherefore the said plaintiff demands judgment against your petitioner for said the sum of $17,000, and interest thereon from March 22, 1873, and for the said further sum of $22,750, and interest thereon from April 23, 1873, and for the said further sum of $446,270.12, and interest thereon from May 13, 1873, and for the said further sum of $64,153.48, and interest thereon from May 19, 1873, and the cost of said action.

And your petitioner further shows that all the aforesaid alleged unlawful acts were done and committed by your petitioner as such collec-

tor of internal revenue and officer of the United States, and were
3 done and committed under color of his office, and under and by virtue of the power and authority in him vested by the laws of the United States, and under the sanction and authority of the Government of the United States.

And your petitioner further shows that the aforesaid moneys collected by your petitioner as such collector aforesaid were taxes and assessments due the United States from the said the New York Central Railroad Company, and from the said the New York Central and Hudson River Railroad Company, and were collected by him for the use of the United States, under and by virtue of the laws of the United States.

And your petitioner further states that the above are all the grounds upon which the said action was commenced against him.

Your petitioner therefore prays that the said action may be removed into the circuit court of the United States in and for the northern district of New York, pursuant to the provisions of the statute in such case made and provided.

And your petitioner will ever pray, &c.

Dated May 31, 1873.

JOHN M. BAILEY.

NORTHERN DISTRICT OF NEW YORK,
Albany County:

John M. Bailey, of Albany, in said county and district, being duly sworn, deposes and says: that he is the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes them to be true.

JOHN M. BAILEY.

Subscribed and sworn to May 31, 1873, before me.
WORTHINGTON FROTHINGHAM,
United States Commissioner, N. D of N. Y.

4 NORTHERN DISTRICT OF NEW YORK, *ss:*

I, Richard Crowley, of Lockport, in said district, do hereby certify that I am a counselor at law in the supreme court of the State of New York and in the district and circuit courts of the United States for said district; that, as counselor for the above-named petitioner, I have examined the proceedings against him, and have carefully inquired into all the matters set forth in the foregoing petition, and that I believe the same to be true.

Dated Lockport, N. Y., May 31, 1873.

RICHARD CROWLEY,
Counselor for Petitioner above named.

5 The President of the United States of America to the supreme court of the State of New York, Albany County, in the third judicial district, greeting:

Being informed that there is now pending before you a suit in which the New York Central and Hudson River Railroad Company is plaintiff and John M. Bailey is defendant, which suit was commenced in said supreme court against the said John M. Bailey for and on account of

acts done by him under the revenue laws of the United States; that said suit was commenced by summons and complaint, and that said suit has not been tried, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said court and removed into our circuit court of the United States in and for the northern district of New York, do hereby command you that you send without delay to the said circuit court as aforesaid the record and proceedings in said cause, so that the said circuit court may act thereon as of right and according to law ought to be done.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, at Utica, this 3rd day of June, A. D. 1873.

[L. S.] CHARLES MASON, *Clerk.*

RICHARD CROWLEY,
Attorney for Plaintiff in Error.

I certify that on the fourth day of June, 1873, at Albany, in my district, I personally served the within writ on George V. Thacher,
6 deputy clerk of Albany County, by delivering a duplicate thereof, with the seal of the court thereon.

Dated Albany, June 4, 1873.

I. F. QUIMBY, *U. S. Marshal,*
By JAS. H. KELLY, *Deputy.*

The return of Albert C. Judson, county clerk of Albany County, and clerk of the supreme court of the State of New York, to the writ of certiorari issued on the application of John M. Bailey, to remove into the circuit court of the United States for the northern district of New York a certain action wherein he is defendant and the New York Central and Hudson River Railroad Company is plaintiff, heretofore pending in said supreme court.

In obedience to and by virtue of said writ of certiorari, issued out of the circuit court of the United States for the northern district of New York and to me directed and delivered, I do hereby certify and return to the said court, that I find the following papers, records, or pleadings on file in my office, entitled in said action, viz: Summons and complaint hereto annexed, marked "A," &c., and no others. All of which I do hereby certify and return, as by said writ I am commanded.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Albany, this 2nd day of June, A. D. 1873.

[L. S.] A. C. JUDSON, *Clerk.*

7 Supreme Court.

THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company, plaintiff, *agt.* JOHN M. BAILEY, DEFENDANT. } Supreme Court.

To the defendant above named:

You are hereby summoned to answer the complaint of the plaintiff, in the action above entitled, a copy of which is hereto annexed, and to serve a copy of your answer on the subscriber, at his office in Albany, within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will take judgment against you for the sum

of $17,000, and interest thereon from March 22, 1873; and for the further sum of $22,750, and interest thereon from April 23, 1873; and for the further sum of $446,270.12, and interest thereon from May 13, 1873; and for the further sum of $64,153.48, and interest thereon from May 19, 1873, and the costs of this action.

Dated Albany, May 21, 1873.

S. T. FAIRCHILD, *of Albany,*
Plff.'s Atty.

8 Supreme court, Albany County.

THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company, plaintiff,
agt.
JOHN M. BAILEY, DEFENDANT.

The New York Central and Hudson River Railroad Company, the plaintiff in the action above entitled, complaining of John M. Bailey, the defendant in said action, alleges and says that the said plaintiff at the several times hereinafter stated was, and still is, a corporation, duly created and organized under the laws of the State of New York, for the purpose of operating a railroad between the cities of New York and Buffalo and other places through the city of Albany, and that said defendant, at the several times above referred to, claimed to be the United States collector for the 14th collection district of said State, and resides in the said city of Albany.

Said plaintiff, further complaining, says that on the 19th day of December, 1868, the New York Central Railroad Company, by resolutions of its board of directors, passed on that day, authorized the issue of interest-certificates to its stockholders to the amount in the aggregate of $23,036,000, being 80 per cent. of the amount of the capital stock of the said the New York Central Railroad Company, and that a form of the said interest-certificates in blank, containing a copy of the said resolutions, is hereto annexed, and marked "A."

The plaintiff, further complaining, says that the whole amount of the expenditures of earnings referred to in said resolutions had been made before July 1, 1862, the date of the passage of the act of the Con-
9 gress of the United States entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt."

The plaintiff, further complaining, says that a dividend of $921,440 upon the said interest-certificates was declared payable February 20, 1869, and the United States internal-revenue tax thereon, amounting to $46,072, was assessed and paid to the United States collector for said collection district, on the 27th day of July, 1869, and that another dividend of $921,440 upon the said interest-certificates was declared, payable August 20, 1869, and the United States internal-revenue tax thereon, amounting to $46,072, was assessed and paid to said collector on the 27th day of January, 1870.

The plaintiff, further complaining, says that the said the New York Central Railroad Company declared two dividends of $1,151,800 each upon its capital stock, payable respectively on the 20th of February, 1869, and the 20th of August, 1869, and duly returned the same to the United States assessor for said collection district, who assessed a tax against said company of $57,590 upon each of said dividends, which tax was paid by said company to said collector, and said plaintiff says that

no dividend in scrip was ever made by the said company, nor was any dividend of any name or nature amounting to 80 per cent. on its capital stock ever made by said company, and that no interest-certificates were ever issued or authorized by said company except those authorized by the resolutions aforesaid, and of which the form in blank is hereto annexed, marked "A," as hereinbefore stated.

The plaintiff, further complaining, says that on the first day of November, 1869, the said the New York Central Railroad Company, under the authority of an act of the legislature of the State of New York,
10 entitled "An act authorizing the consolidation of certain railroad companies," passed May 20, 1869, was consolidated with the Hudson River Railroad Company into a new company, the plaintiff in this action, and from the said 1st day of November, 1869, the said the New York Central Railroad Company ceased to exist, except for certain purposes specified in the act aforesaid.

The plaintiff, further complaining, says that on the 3d day of March, 1870, Ralph P. Lathrop, claiming to be assessor of said district, made a pretended assessment against the New York Central Railroad Company, and served a notice thereof, of which the following is a copy, viz:

"UNITED STATES INTERNAL REVENUE,
"ASSESSOR'S OFFICE, 14TH DISTRICT, NEW YORK,
"*Albany, March* 3, 1870.

"SIR: I have this day made the following assessment against the New York Central Raidroad Company:

"Capital stock Dec. 19, 1868	$28,795,000
"Scrip dividend or int.-certificates, being 80 per cent. of capital	$23,036,000
"Tax on same, at 5 per cent	1,151,800
"Penalty for failure, (section 122)	1,000
"Amount of tax	1,152,800

"Respectfully,

"R. P. LATHROP,
"*Assessor, 14 District.*

"CHARLES WENDELL,
"*Acting Treasurer N. Y. Central R. R. Co.*"

The plaintiff, further complaining, says that said pretended assessment was made by said Lathrop without any notice by advertisement in a newspaper, by posting notices, by mail or otherwise, and the list containing it was on the same day that said pretended assessment
11 was made, or on the next day thereafter, transmitted by said Lathrop, without any notice to the plaintiff to the said defendant as such collector, for the collection of said pretended assessment, and so the plaintiff says that no opportunity was given for an appeal from said pretended assessment for any statement of facts showing the same to be unjust and illegal, and the plaintiff alleges and claims that said pretended assessment is illegal, unjust, and in violation of the Constitution of the United States.

The plaintiff, further complaining, says that on the 4th day of March, 1870, said defendant, claiming to act as such collector, served a notice, partly printed and partly written, upon one C. Wendell, in regard to

the tax referred to in the aforesaid pretended assessment, of which notice a copy is hereto annexed and marked "B."

The plaintiff, further complaining, says that on the 16th day of March, 1870, said defendant caused to be served on said Wendell, another notice, partly printed and partly written, of which a copy is hereto annexed, marked "C."

The plaintiff, further complaining, says that on the 31st day of May, 1871, said defendant caused to be served on E. D. Worcester, then the plaintiff's treasurer, another notice, partly printed and partly written, of which a copy is hereto annexed, marked "D."

The plaintiff, further complaining, says that no notice of said tax was ever received by said plaintiff, other than that last above referred to; and that an appeal was taken from said assessment to the Commissioner of Internal Revenue, by whom William Orton, esq., late Commissioner of Internal Revenue; Mr. John F. Smyth, late supervisor of internal revenue, and the said assessor, R. P. Lathrop, esq., of the 14th district, were appointed a committee to make an examination and report in regard to the validity of said tax; that said committee, in January,
12 1872, made their report in writing to said Commissioner, a copy of which is hereto annexed "G," by which report said committee found and reported, among other things, that "the distribution of these certificates" (interest-certificates,) "did not create a liability to tax, and, therefore, that the company was not liable to the assessment from which it has appealed."

The plaintiff, further complaining, says that the Solicitor of the Internal Revenue Department of the United States had previously decided that the company issuing said certificates was not liable to a tax on account of such issue, and the plaintiff says that the Commissioner of Internal Revenue disregarded the report of said committee, and the said decision of the said Solicitor, and decided that "The New York Central Railroad Company is liable to a tax of five per cent. (without penalty), on $9,214,000, being 6-15 of the entire dividend, the proportionate amount chargeable to the period between September 30, 1862, and September 30, 1868."

The plaintiff, further complaining, says that said defendant demanded of the plaintiff the sum of $462,720, under said pretended assessment against the New York Central Railroad Company, and, for the purpose of collecting the same, said defendant unlawfully and without authority seized, and on the 22d day of March sold, seventeen locomotive engines and tenders, belonging to the plaintiff, and received therefor on such sale the sum of $17,000; and said defendant afterwards, for the purpose of collecting said tax, seized unlawfully and without authority eight other locomotive engines and tenders, also belonging to the plaintiff, and on the 23d day of April, 1873, sold the same and received therefor, on said sale, the sum of $27,750; and said defendant afterwards, for the purpose of collecting said tax, unlawfully seized twenty-three other locomotive engines and tenders, thirty-six passenger coaches and
13 three baggage-cars, all the property of the plaintiff, and threatened to sell the same and to seize and sell other property of the plaintiff, and to harrass, annoy, and irreparably injure the plaintiff in its business and affairs for the purpose of collecting sa d pretended assessment of $462,720; and the plaintiff says that for the purpose of avoiding the sacrifice of its property and the damage threatened as aforesaid by said defendant to the property, business, and affairs of the plaintiff, the plaintiff paid to said defendant, under duress and protest, on the 13th day of May, 1873, the sum of $446,270.12, and on the 19th day of May,

1873, the further sum of $64,153.48; that said payments were accompanied with written protests delivered to said defendant at the times of said payments respectively, and of which copies are hereto annexed and marked respectively, "E" and "F."

The plaintiff, further complaining, says that it claims and insists that no tax has ever been assessed by said assessor or by said commissioner of internal revenue against the plaintiff on account of said interest certificates; and that no tax or assessment on account of the issue of said interest certificates has ever been made by said assessor or by said Commissioner of Internal Revenue, other than that mentioned in the said notice signed by said Lathrop, and dated March 3, 1870, and reduced by the said decision of the Commissioner of Internal Revenue above referred to; and that the aforesaid pretended tax or assessment, which said defendant has collected of the plaintiff by the distraints and sales and threats and duress aforesaid, is illegal, unjust, and not authorized by any law of the United States; but has been enforced and collected as aforesaid by the defendant from the plaintiff, in violation of the Constitution and laws of the United States. Said exhibits, "A," "B," "C," "D," "E," "F," "G," are hereby made a part of this complaint.

14 SECOND CAUSE OF ACTION.

The plaintiff, for a second and further cause of action, complaining says, that at the several times hereinafter mentioned, the defendant received for the use of the plaintiff, the several sums of money hereinafter stated respectively, viz: On the 22nd of March, 1873, defendant received $17,000; on the 23rd of April, 1873, defendant received $22,750; on the 13th of May, 1873, defendant received $446,270.12; on the 19th day of May, 1873, defendant received $64,153.48, all the moneys of the plaintiff, and the defendant thereby became and was, and still is, justly indebted to the plaintiff in the several sums above mentioned, with interest thereon from the several times when said moneys were so received by said defendant, respectively as aforesaid, and being so indebted, said defendant promised to pay said plaintiff said several sums of money, with interest thereon from the several times when said moneys were so received by said defendant, respectively, as aforesaid; and being so indebted, said defendant promised to pay said plaintiff said several sums of money, with interest thereon as aforesaid, but has neglected and refused to pay the same or any part thereof, although requested to do so.

Whereupon the plaintiff demands judgment against the said defendant for the said sum of $17,000 and interest thereon from March 22, 1873, and for the said further sum of $22,750, and interest thereon from April 23, 1873; and for the said further sum of $446,270.12, and interest thereon from May 13, 1873; and for the said further sum of $64,153.48, and interest thereon from May 19, 1873, and the costs of this action.

S. T. FAIRCHILD, *of Albany,*
Plff.'s Atty

ALBANY COUNTY, *ss:*

15 Henry R. Pierson, being duly sworn, says that he is one of the directors of the New York Central and Hudson River Railroad Company, the plaintiff named in the foregoing complaint, and that said complaint is true to the knowledge of deponent, except as to those mat-

ters stated on information and belief, and as to those matters he believes it to be true.

H. R. PIERSON.

Sworn before me, May 23, 1873.

FRANCIS DEPFUHL,
Notary Public.

16 "A."

THE NEW YORK CENTRAL RAILROAD COMPANY.

Whereas this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent. of the capital stock of the company, and whereas the several stockholders of the company are entitled to evidence of such expenditure, and to re-imbursement of the same at some convenient future period. Now, therefore,

Resolved, that a certificate, signed by the president and treasurer of this company, be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per cent. of the amount of the capital stock held by him, payable rateably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on the shares of the capital stock of the company, and that such certificates may be at the option of the company convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

Resolved, that such certificates be delivered to the stockholders of this company at the Union Trust Company, in the city of New York, on the presentation of their several certificates of stock, and that the receipt of the certificate provided for in these resolutions shall be endorsed on the stock certificate.

THE NEW YORK CENTRAL RAIDROAD COMPANY.

No. *Interest-certificate.*

Under a resolution of the board of directors of this company, passed December 19, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that being the holder of shares of the capital stock of said company, is entitled to dollars, payable rateably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

This certificate may be transferred on the books of the company on the surrender of this certificate.

In witness whereof the said company has caused this certificate to be signed by its president and treasurer this 19 day of December, 1868.

President.
Treasurer.

17 For a valuable consideration do hereby sell, assign, and transfer all interest in the above certificate to , and do hereby irrevokably appoint attorney to execute a

transfer thereof on the books of the railroad company therein mentioned.

17] "B."

Monthly notice.

List. Div. 4.

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
14 DISTRICT, STATE OF NEW YORK,
Albany, N. Y., March 4, 1870.

M. Treasurer New York Central Railroad, Albany, N. Y.:

The tax assessed against the N. Y. C. R. R. for dividend amounting to $1,152,800.00, is due and payable on or before the 14 day of March, and unless paid within that time it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month.

J. M. BAILEY,
Collector.

☞Bring this notice with you.

21] "C."

General demand for taxes.

List. 4 Div.

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
14 DISTRICT, STATE OF NEW YORK.
Albany, March 15th, 1870.

M. The New York Central Railroad Company, or (the New York Central and Hudson River Railroad Company:)

A tax, under the excise laws of the United States, amounting to $1,152,800, being for tax on scrip dividend, has been assessed against you, and transmitted to me by the assessor of this district. The same not having been paid within the time required by law, you become liable to pay five per centum additional upon the amount thereof, and interest at one per centum per month from the 14 day of March, 1870, and demand is hereby made upon you for the said tax, with the additional five per centum and such interest as may accrue before payment. If not paid within ten days from the personal service or mailing hereof, it will become my duty to collect the same by distraint and sale of property.

18 Payment may be made to me at my office, No. 59 State st., Albany.

Am. of tax	$1,152,800
Penalty	57,640
Total	$1,210,440

J. M. BAILEY, *Collector.*

☞Bring this notice with you.

21] "D."

General demand for taxes.

List. 4 Div.

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
14 DISTRICT, STATE OF NEW YORK.
Albany, March 15, 1870.

M. The New York Central Railroad Company, or (the New York Central and Hudson River Railroad Company:)

A tax, under the excise laws of the United States, amounting to $1,151,800.00, being for tax on scrip dividend, has been assessed against you, and transmitted to me by the assessor of this district. The same not having been paid within the time required by law, you became liable to pay five per centum additional upon the amount thereof, and interest at one per centum per month from the 14 day of March, 1870, and demand is hereby made upon you for the said tax, with the additional five per centum and such interest as may accrue before payment. If not paid within ten days from the personal service or mailing hereof, it will become my duty to collect the same by distraint and sale of property.

Payment may be made to me at my office, No. 59 State st., Albany.

Am. of tax $1,151,800
Penalty .....

Total .....

J. M. BAILEY, *Collector.*

☞Bring this notice with you.

"E."

To JOHN M. BAILEY, United States collector:

Please to take notice that the undersigned, the New York Central and Hudson River Railroad Company, protest against the payment of $446,270.12, demanded by you on account of a pretended tax claimed to have been assessed upon the issue, by the New York Central Railroad Company, of certain interest-certificates.

The undersigned claim that said tax is illegal and unconstitutional, and said money is paid under duress and not voluntarily, because you have distrained the property of the undersigned and threaten to distrain other of its property, and so cause the undersigned irreparable injury, and not because the undersigned is legally or equitably bound to pay said money; and the undersigned will take such legal proceedings as may be proper for the purpose of recovering said money back.

19

Dated May 13, 1873.

THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY,
By S. T. FAIRCHILD, *Attorney.*

"F."

To JOHN M. BAILEY, *United States Collector:*

Please to take notice that the undersigned, the New York Central and Hudson River Railroad Company, protest against the payment of

$64,153.48, demanded by you on account of interest on a pretended tax claimed to have been assessed upon the issue by the New York Central Railroad Company of certain interest-certificates.

The undersigned claim that said interest or tax is illegal and unconstitutional, and said money is paid under duress and not voluntarily, because you have distrained the property of the undersigned and threaten to distrain other of its property, and so cause the undersigned irreparable injury, and not because the undersigned is legally or equitably bound to pay said money; and the undersigned will take such legal proceedings as may be proper for the purpose of recovering said money back.

Dated Albany, May 19, 1873.

THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY,
By E. D. WORCESTER, *Sec.*

"G."

NEW YORK, *January* , 1872.

Hon. JOHN W. DOUGLASS,
Commissioner of Internal Revenue:

SIR: Early in August, 1871, the undersigned severally received from your predecessor, Hon. Alfred Pleasanton, a communication of which the following is a copy:

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"*Washington, August* 1, 1871.

"SIR: The New York Central Railroad Company having requested opportunity for the examination of their books and papers, for the purpose of showing that a portion of the tax assessed against them on account of the issue of certain interest-certificates should be abated on all earnings of said road which accrued before the law was enacted, I have the honor to state that William Orton, esq., late Commissioner of Iinternal Revenue, Mr. John F. Smyth, late supervisor of internal revenue, Assessor R. P. Lathrop, of the fourteenth district, are authorized to act as a committee to conduct this examination. The New York Central Railroad Company have acceded to this proposition, and, should you accept this appointment, please notify this office, when further instructions will be sent you.

(Signed) "A. PLEASANTON,
"*Commissioner.*"

The appointment was accepted, but, on account of the protracted illness of Mr. Orton, nothing was done in the premises until about the middle of November last, when notice was sent to you of the readiness of the committee to proceed, on the receipt of the "further instructions" mentioned in the letter of Commissioner Pleasanton.

Under date November 18th, you replied to this notice by forwarding to Mr. Orton a copy of communication addressed to Commissioner Pleasanton by honorable George S. Boutwell, Secretary of the Treasury, under date June 19th, 1871, as follows:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"*June* 19, 1871.

"SIR: In the case of the application of the New York Central Railroad Company, for a rehearing upon an appeal from the decision of the Com-

missioner of Internal Revenue, declaring the liability of the corporation to taxation upon the amount of scrip issued by said company in the year 1869, I declined to hear the appeal upon the ground that it was not necessary to the due administration of the law, or for the protection of the rights of the company. Having stated orally to General Cushing, the counsel for the Central Railroad Co., the conclusion reached, a conversation took place between us as to the expediency of an adjustment without further legal proceedings, and I gave him in brief the views entertained by me as to the proper basis of such adjustment. Following that conversation, he left for New York, for the purpose of conferring with the officers of the company, and on Saturday last I received the following telegraphic dispatch:

"'NEW YORK, *June* 17, 1871.

"'Hon. GEORGE S. BOUTWELL,

"'*Secretary Treasury, Washington, D. C.:*

"'The New York Central Railroad Company accept the conclusions of the Government, as communicated by me, and desire me to confer with you in regard to the persons to be appointed to state the accounts, and the instructions to be given to them. I am under the necessity of attending professional appointments in Providence and Boston, which will occupy me about eight or ten days, after which I shall return to Washington, probably before you return there. I
21 trust it may be convenient to the Government to allow the matter to stand without further action until that time. I propose to take occasion to see you on the subject early next week, either at Boston or at Groton.

"'CALEB CUSHING.'

"Anticipating that an adjustment may be agreed upon, I have made memoranda of the basis of the same, which I herewith transmit to you for your consideration and opinion before any further action is taken in the premises.

"Should the terms of arrangement be agreed upon, the case will be returned to the internal-revenue office for adjustment.

"Very respectfully,

(Signed) "GEORGE S. BOUTWELL,

"*Secretary.*

"Hon. ALFRED PLEASANTON,

Commissioner of Int. Rev., Washington, D. C.

"MEMORANDA.

"First. The scrip in question having been issued since the passage of the internal-revenue laws, the presumption is that it was issued to represent earnings made subsequent to the passage of said laws, and that it is, therefore, liable to taxation.

"Second. It follows that the burden of proof is upon the New York Central Railroad Company to show what part of said scrip, if any, represents earnings made previous to the passage of the internal-revenue laws.

"Third. All scrip not so shown to represent earnings made previous to the passage of said acts to be liable to taxation.

"Fourth. All earnings made since the passage of the internal-revenue acts applied to payment of debts and not included in scrip dividends subject to taxation.

"Fifth. This arrangement not to effect the right of the Government to assess and collect any taxes for which the New York Central Railroad Company may be liable other than the tax upon the scrip referred to.

"Query. Are there any penalties, and, if so, should claim be made on that account?"

When these memoranda were submitted to the representatives of the New York Central Railroad Company, they expressed surprise at what appeared to be the restriction of the inquiry by the committee to the financial operations of the company during the period from its formation to September 1, 1862, when the internal-revenue law took effect. They stated their understanding to be, that all questions touching the liability of the company for taxes claimed to be due to the United States were to be referred to the committee. They exhibited a letter written
22 at Washington, June 16, 1871, by Hon. Caleb Cushing, counsel of the company, reporting an interview with the Secretary of the Treasury, and reciting the conclusions of the Secretary as follows:

"First. That the company is liable for tax on the earnings since the date of the internal-revenue act.

"Second. That the company is probably not liable for tax on the earnings prior to that date.

"Third. That if the company assent to this view of the subject, the Government will concur in some convenient and just form of truly stating the accounts anterior and posterior to the assumed date.

These conclusions are subject to the question which you have the right to raise, whether the assessment has been made in due form of law so as to fix the liability of the company."

They stated further that it was on account of the representations in the letter of Mr. Cushing that they authorized him to send the following message:

"NEW YORK, *June* 17, 1871.

"Hon. GEORGE S. BOUTWELL,
"*Secretary of Treasury, Washington, D. C.:*

"The New York Central Railroad Company accept the conclusions of the Government, as communicated to me, and desire me to confer with you in regard to the persons to be appointed to state the accounts, and the instructions to be given to them. I am under the necessity of attending professional appointments in Providence and Boston, which will occupy me about eight or ten days, after which I shall return to Washington, probably before you return there. I trust it may be convenient to the Government to allow the matter to stand without further action until that time.

(Signed) "CALEB CUSHING."

A copy of this message appears also in the letter of Secretary Boutwell to Commissioner Pleasanton, hereinbefore referred to.

They also submitted the following correspondence between Horace F. Clark and James H. Banker, esqrs., on behalf of the railroad company and Commissioner Pleasanton:

"NEW YORK, *June* 12, 1871.

"Hon. ALFRED PLEASANTON,
"*Commissioner of Internal Revenue, Washington, D. C.:*

"DEAR SIR: In behalf of the New York Central Railroad Company, we take the liberty to suggest that in the decision of the question of the

tax against that company, founded upon the issue of interest-certificates in 1868, recently made by yourself, you have overlooked several matters which are entitled to consideration, both as to the subject of the tax itself, as well as to the amount which may be justly claimed on the part of the Government upon any proper construction of the revenue laws.

23 "We are well satisfied that a rehearing of the case will enable you to do entire justice to the Government, and at the same time relieve the company from a burden of taxation, oppressive in character, and extraordinary in amount, which, we think, can be demonstrated to have been imposed without authority of law.

"Further evidence can be adduced, which we feel assured will enable you to correct errors which are believed to have occurred in your disposition of the case.

"To this end, we respectfully apply for a re-examination of the case by your Department.

"Yours, respectfully,

(Signed) "H. F. CLARK,
"JAMES H. BANKER,
"*Commissioners.*"

"TREASURY DEPARTMENT,
"OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
"*Washington, July 18th*, 1871.

"To HORACE F. CLARK, Esq., and JAMES H. BANKER, Esq.,
"*Committee New York Central Railroad Company:*

"GENTLEMEN: I received in due course of mail your letter of the 12th ultimo, suggesting that in the decision of the question of the tax against the New York Central Railroad Company, founded upon the issue of interest-certificates, I have overlooked matters entitled to consideration, both as to the subject of the tax itself and as to the amount which may be justly demanded, and asking that the case be opened for a rehearing, in order that the company may be relieved from any burden which you think you can demonstrate to be unjust on further proofs and hearing.

"As all proofs of the alleged grievance of which you complain are almost wholly confined to the records and books of the company, I propose, with the consent of the company, to authorize the Hon. William Orton, late Commissioner of Internal Revenue, and John F. Smyth, esq., late supervisor of internal revenue, in connection with Assessor R. P. Lathrop of the fourteenth district, to make a full examination touching the matter in controversy, and to report to this office.

"It affords me pleasure, therefore, to say, in answer to your letter, that the collection of the tax will be suspended a reasonable time until you can prepare and present this further evidence.

24 "It is proper to add that the appeal taken to the Secretary of the Treasury, of your case, has prevented earlier attention to its contents.

"Very respectfully,

(Signed) "A. PLEASANTON,
"*Commissioner.*"

The representatives of the railroad company were unwilling to proceed with the investigation under the limitation of the authority of the committee, as inferred by them from the memoranda of Secretary Bout

well, which you had forwarded in reply to their request for instructions. The state of the case was then reported to you by letter of Mr. Orton, under date November 22. Under date December 1, you forwarded to him an official copy of the letter of Commissioner Pleasanton, hereinbefore referred to and recited, addressed to Horace F. Clark, esq., and James H. Banker, esq., of date July 1, 1871. Although this letter expressly stipulated "a full examination touching the matter in controversy," it was not accompanied by any instructions, and the committee were, therefore, embarrassed by the apparent disagreement between the memoranda of the Secretary sent as instructions to the examiners and the letter of the Commissioner to the company announcing the appointment of the persons by whom the examination would be made. The committee deemed it advisable that the matter should be again presented to you, and, shortly thereafter, one of the undersigned (Mr. Orton) called on you at your office in Washington, and, at a personal interview, stated the embarrassment under which the committee labored, and asked further instructions. After some consideration and consultation with Mr. Chesley, the Solicitor, who was present, you stated in substance that the committee were expected to report all the facts ascertainable which, in their judgment, related to the question of the liability of the New York Central Railroad Company for taxes due the United States, either in respect of the assessment from which they had appealed, or otherwise. That on receipt of the committee's report, which would be deemed conclusive as to the facts, the representatives of the railroad company would be heard, if they so desired, as to the law applicable to the facts, and to the construction to be put upon it by your office. Under these general instructions, the undersigned have proceeded with the investigation, and, as the result thereof, respectfully submit the following

Report.

The New York Central Railroad Company was organized under an act of the legislature of the State of New York, which authorized the consolidation into a single corporation of the several railroad companies then in operation between Buffalo and Niagara Falls, at the western, and Troy and Albany at the eastern extremity of the State. The articles of agreement were entered into by said companies under date May 17, 1853, and the first board of directors were elected on the 6th day of July following. The law authorizing the consolidation limited the capital stock of the new company to the sum of the capitals of the several companies entering into consolidation. Under this limitation it was fixed at $23,085,600. The stock of a majority of the companies going into consolidation was worth, in the market, more than par, while the stock of the new company was limited to the aggregate of the stocks of the several companies at par. In order to equalize values, and to provide for the excess above par, it was agreed that debt-certificates should be issued by the new company, and distributed to the stockholders of the several companies, to an amount equal to the agreed premium on the stock held by them in the several companies.

These debt-certificates amounted to.....	$8,885,210 00
In addition, the debts of the old companies were assumed by the new, amounting to	1,861,823 62
And a further sum, in bonds, was issued in exchange for the stock of the Great Western Railroad Company of Canada, and of the Buffalo & State Line Railroad Company, which was transferred, by the	

several companies owning them, to the consolidated company, amounting to		817,000 00
Making a total funded debt, at the formation of the company, of		$11,564,033 62

It was stipulated, in the consolidation agreement, that a sinking fund should be provided by the new company, for the purpose of securing the payment of the principal of the debt-certificates by setting apart annually out of the earnings, after first paying all the expenses of maintaining and operating the road, and the interest on the said certificates, an amount equal to one and one-fourth of one per cent. on the total amount of the principal of all the certificates issued.

The fiscal year of the company ends with the 30th of September, and its accounts are made up accordingly in compliance with the requirements of the laws of the State of New York.

On the 30th of September, 1862, the capital stock was		$24,000,000 00
And the funded debt		14,279,593 37
26 At that date the gross earnings and revenue of the company amounted to		$66,621,288 36
Which has been disbursed as follows:		
Maintaining and operating	$38,390,357 58	
Interest	8,683,309 12	
Sinking fund	1,067,415 06	
Dividends	15,789,911 58	
		63,930,993 34
Leaving, as apparent profit unappropriated, the sum of		$2,690,295 02
From October 1, 1862, to September 30, 1864, the earnings and revenue amounted to		$23,895,521 21
Of which there was expended for—		
Maintaining and operating	$16,388,266 90	
Interest	2,024,905 87	
Sinking fund	223,242 40	
Tax on receipts	84,959 88	
Dividends	3,873,850 00	
Tax on dividends	135,723 50	
		22,730,948 55
Leaving an excess of revenue unappropriated of		$1,164,572 66
From October 1, 1864, to September 30, 1868, the earnings and revenue amounted to		$56,933,127 45
Of which there was disbursed for—		
Maintaining and operating	$42,083,321 25	
Interest	3,825,848 45	
Sinking fund	445,649 52	
U. S. tax on earnings	861,867 99	
Dividends	6,609,900 00	
U. S. tax on dividends	330,495 00	
		54,157,082 21
Leaving an excess of revenue unappropriated of		$2,776,045 24

The period from September, 1862, to 1868, has been subdivided at September, 1864, because it is claimed by the representatives of the company that until June 30, 1864, no tax was imposed upon the
27 profits of railroad companies except as such profits were distributed in dividends to stockholders.

The annexed exhibit, marked, "A," presents the statements aggregated above in yearly detail. The undersigned have carefully compared the details therein presented with the detailed statements contained in the annual reports of the company from 1853 to 1868, both inclusive, and believe them to be true and accurate. Their correctness is also established by the declaration of Mr. Worcester, made under oath, hereto annexed

On the 19th day of December, 1868, the capital stock of the company was $28,795,000.

At a meeting of the directors held on that day, the following preamble and resolutions were adopted:

"Whereas this company has hitherto expended of its earnings, for the purpose of constructing and equipping its road, and in the purchase of real estate, and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent. of the capital stock of the company; and whereas the several stockholders of the company are entitled to evidence of such expenditure, and to re-imbursement of the same at some convenient future period:

"Now, therefore, Resolved, That a certificate signed by the president and treasurer of this company be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per cent. of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on the shares of the capital stock of the company, and that such certificates may be at the option of the company convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

"Resolved, That such certificates be delivered to the stockholders of this company, at the Union Trust Company, in the city of New York, on the presentation of their several certificates of stock, and that the receipt of the certificate provided for in these resolutions shall be indorsed on the stock certificate."

The certificate issued under this authority read as follows:

"Under a resolution of the board of directors of this company, passed December 19, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that being the holder of shares of the capital stock of said company, is entitled to dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earn-
28 ings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company

"This certificate may be transferred on the books of the company on the surrender of this certificate.

"In witness whereof the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868."

The certificates issued amounted to $23,036,000.

On the same day, at the same session, the directors declared a dividend of four per cent. in cash, on both the stock and certificates. The sum thus divided in cash was $2,073,240, being four per cent. of $51,831,000, the aggregate of stock and certificates.

On the third day of March, 1870, Assessor R. P. Lathrop, of the fourteenth district, by direction of J. O'Donnell, supervisor for the northern district of New York, made the following assessment against the New York Central Railroad Company:

Capital stock December 19, 1868	$28,795,000
Scrip-dividend or interest certificates, being eighty per cent. of capital	23,036,000
Tax on same, at five per cent.	1,151,800
Penalty for failure, (sec. 122)	1,000
Amount of tax	1,152,800

Notice of this assessment was given by the assessor to the acting treasurer of the railroad company. On the following day demand was made upon the treasurer of the company for the payment of this sum, by service of a written and printed notice, signed J. M. Bailey, collector. This notice stated that unless the sum demanded was paid on or before the 14th day of March, it would become the duty of the collector to collect the same, with a penalty of five per cent. additional, and interest at one per cent. per month. On the 15th day of March, following, another notice, signed by J. M. Bailey, collector, was served upon the treasurer, addressed to "the New York Central Railroad Company, or the New York Central and Hudson River Railroad Company," demanding the payment within ten days of $1,152,800, and a further sum of $57,640, being an addition of five per cent. as penalty for non-payment within the time fixed by the previous notice.

The railroad company appealed from this action of the revenue officers to the Commissioner of Internal Revenue, Hon. A. Pleasanton, who sustained the revenue officers. A further appeal was taken by the company to the Secretary of the Treasury, which resulted in the reference to the undersigned.

In the absence of a definite agreement between the United States and the New York Central Railroad Company, and of specific instructions from your office, we assume the purpose of this inquiry to be to
29 ascertain if the company was liable to the assessment from which it has appealed.

Before answering this question, it becomes necessary to consider and determine—

First. Was the issue and distribution of the certificates, authorized by resolution of the directors, on the 19th of December, a "dividend in scrip or money due or payable to the stockholders * * * * as part of the earnings, profits, income, or gains;" or

Second. Are the certificates subject to tax because of their liability to be termed "scrip," without reference to whether they represent "earnings, profits, income, or gains?"

These are questions of fact and of law, and both are so closely blended that neither can be fairley considered apart from the other.

The evidence taken establishes the fact that the undivided profits of the company, from its organization in 1853, to September 30, 1868, amounted to $9,630,912 92

It also appears (see Exhibit B) that of this sum 5,041,997 61

have been expended and charged to cost of road. Leaving only $1,588,915 31

of unexpended profits aplicable to dividends. This remainder is, however, to be still further diminished by deducting therefrom 913,599 00

which, as is shown by the evidence of Mr. Worcester, was taken from the profits which had accumulated prior to September 30, 1868, to pay the cash dividend of four per cent. on the stock and certificates declared December 19, 1868. Deducting this from the last remainder leaves a balance of $675,316 31

to represent the unexpended portion of all the accumulated profits from the formation of the company in 1853, to September 30, 1868.

In the opinion of the undersigned, no tax is imposed by the revenue laws upon the issue of scrip by a railroad company, except in so far as it is the representative of, and substitute for, "part of the earnings, profits, income, or gains" of such company. It will not be claimed that changes in the basis of capitalization afford proper grounds for levying assessments. The tax on dividends is a part of the scheme for raising revenue from incomes, and in the case of persons, provision is made for deducting the dividends received from corporations which are required to pay the tax thereon. The rules governing the construction of the law in one case are applicable substantially to the other. In the individual case the question is, What gain or profit has been received or is receivable? and, in that of a corporation, What has been divided or is divisible? The certificates under consideration amounted nominally to more than twenty-three millions of dollars, while the excess of revenue over expenses and dividends, from 1862 to 1868, was less than four millions. By the terms of the certificates they were payable only "at the pleasure of the company," and "out of its future earnings." They did not profess to be, and were not in fact, substitutes for any "part of the earnings, profits, income, or gains" of the company which had theretofore accrued. They may rightly be styled the certified opinions of the directors, touching the probable results of their management of the property, put in convenient form for discount and sale.

By the testimony of Hon. Horace F. Clark, Sidney T. Fairchild, esq., and E. D. Worcester, esq., hereunto annexed, the fact is established that in the issue of these certificates the directors acted in the belief that the earnings and profits of the company would be much larger in future than they had before. There was no authority in law for a direct increase of capital stock, and there was a provision that companies dividing more than ten per cent. shall be liable to have their rates of fare and freight controlled by legislative action, which is held to imply an agreement by the State not to interfere so long as the rate of dividend is less than ten per cent. In order, therefore, to avoid the liability to legislative interference to reduce rates, and the risks attending the increase of capital by an unauthorized issue of shares, and at the same time to avail of increased facilities for speculation without increasing the risk of losing control of the stock, a scheme was devised involving the issue of certificates which conferred upon the owners thereof all the benfits and privileges of stockholders, excepting only the right to vote. The effect was simply to expand the surface over which future profits would be distributed at a lower rate, a process familiarly known by the phrase generally applied to this transaction in financial circles, "watering stock."

We conclude, therefore, that the issue of these certificates was, in effect, an increase of capital based wholly on a prospective increase of revenue, and not a dividend, or of a substitute for accrued profits; that *that* whatever the obligation of the company may have been accru- *time, or may now be, for tax in respect of the undivided to profits and* ing during the whole or any part of the period from 1862 to 1868, the distribution of these certificates did not create a liability to tax, and, therefore, that the company was not liable to the assessment from which it has appealed.

At the request of the representatives of the company, we note here their claim that the assessment is void for informality, in that it includes $1,000 as "penalty for failure," under section 122. It is further claimed on behalf of the company that the right to reconsider
31 and re-assess, in cases of error and omission in respect of the returns of a railroad company, is limited to a period of fifteen months preceding such re-assessment.

It is the opinion of the committee that the company should have been required to include in its return of profits accrued and divided since July 1, 1864, the balance remaining to the credit of residue or income account, after deducting the Buffalo and Erie dividends ($650,607.43,) and the portion of the excess applied to the payment of the dividend of December 19, 1868. Also, that the amount set aside annually since July 1, 1864, as a sinking-fund for the payment of the so-called debt-certificates, issued under the agreement of consolidation in 1853. The details of these accounts will be found fully set forth in the annexed exhibit marked "A." Exhibit B shows the amount expended and charged to "cost of road," the portion capitalized and represented by the funded debt, and the amount expended, which has not been capitalized, taken from traffic receipts.

An examination of the details of the account for "maintaining and operating," shows that, on several occasions, items have been charged to this account which it has been claimed belong in construction, or "cost of road" account. The practice of the company, however, appears to have been the same before the passage of the internal revenue law as since, and it does not appear that the amount annually charged to expense of maintenance was greater than was necessary to keep the property in repair and make up the average of the annual decay. It is extremely difficult to arrive at a definite conclusion on this point, for the reason that the only basis for calculation is the opinion of experts as to what is the percentage annually of the waste of track and rolling-stock, and the decay of station-houses, bridges, and other structures. In order, however, that the facts may be before you, we have appended hereto a schedule (Exhibit C) of the only items and amounts as to which inquiry may be properly made.

Although it was not a part of the case, as appears by the papers submitted to the committee, it is deemed proper to mention the fact that the taxes heretofore paid by the company were a portion of the profits on which no tax has been paid. The amount paid for taxes at three per cent. is $86,953.50, and at five per cent. $379,265. This is to September 30, 1868.

In addition to the schedules A, B, and C, hereinbefore referred to and described, we have appended the verbatim reports of so much of the examination of Messrs. Clark, Fairchild, and Worcester as seemed material, and also a statement of Mr. Farcand, attorney and coun-

32 sel for the company, in explanation of the annual appropriation
tion for sinking-fund.

All of which is respectfully submitted.

We have the honor to be, very respectfully, you' obedient servants,

(Signed) WILLIAM ORTON.
JOHN F. SMYTH.
RALPH P. LATHROP.

EDWIN D. WORCESTER, being duly sworn, testified as follows:

By Mr. Orton:

Q. You are connected with the New York Central Railroad Company?

A. I am.

Q. How long have you been connected with it?

A. From early in 1854 until its consolidation with the Hudson. I was then treasurer of the consolidated company.

Q. What official positions have you held during the period of your connection with the New York Central?

A. I was, first, general accountant, then assistant treasurer, and then treasurer of the consolidated company with the Hudson River, and I am now secretary of the latter company.

Q. Please look at the paper now handed to you, and state what it purports to be.

A. This is a compilation from the annual reports of the New York Central Railroad Company, made to the State engineer and surveyor under oath, as required by law, and shows the amount of the earnings each year, and the items charged against earnings and revenue in each year.

Q. You say the figures on that paper have been compiled from annual reports made by the company during the several periods; first, from May 1, 1853, to September 30, 1862; second, from this date to September, 1864; third, from the latter to September 30, 1868.

A. Yes, sir.

Q. Have you ever made an examination of the books and records of the company for the period covered by this paper, for the purpose of ascertaining whether the statements and exhibits in those reports actually represented the affairs and accounts of the company?

A. Every one of the reports from which that compilation was made was prepared by myself or under my supervision, from the books and records of the company.

Q. We understand, then, that you indorse the accuracy of these statements, from your own personal and official knowledge?

A. Entirely.

33 Q. Under which of these heads has any of the new construction
tion carried on by the company been charged?

A. The amounts expended by the company on construction account were charged to costs of roads.

Q. Have any sums of money been expended by the Central Railroad Company from the 1st of May, 1853, to the 30th of September, 1868, for the construction of new bridges, new station-houses, sidings, and double track?

A. There have been sums expended for those purposes.

Q. Were they made from traffic receipts?

A. A portion were.

Q. Is that portion derived from traffic receipts included in the amounts represented on this paper under the heading "Maintaining and operating?"

A. No, sir.

Q. Under which of the headings?

A. They are represented in the column headed "Residue each year."

Q. Is there an account on the company's books showing the disposition of the sums represented under the heading "Residue each year?"

A. Not in a single account; it will only appear by an analysis of all the accounts.

Q. Have you an account called "Construction account?"

A. We have an account entitled "Cost of road," which includes expenditures for construction.

Q, Have all the expenditures on that account been taken from the sums represented under the heading "Residue each year?"

A. No, sir.

Q. Will the "Cost of road" account show what portion of the expenditures for construction has been made from the sums covered under the heading "Residue each year?"

A. That account alone will not show it.

Q. Is it practicable to present an exhibit from the books of the company, showing what portion of expenditure under the head of "Cost of road," have been made from moneys included in the amounts under the head of "Residue each year?"

A. It is.

Q. Will you oblige the committee by preparing such an exhibit?

A. I will.

(Mr. Worcester subsequently appeared before the committee, and made the following statement in answer to the last question:

The amount from the 1st of May, 1853, to the 30th of September, 1862, was	$2,626,658 80
From 30th September, 1862, to September, 1864	1,142,903 21
From September, 1864, to September 30, 1868	1,272,435 60)

34 Q. I desire to call your attention again to the memorandum on Exhibit A, presented by you, which refers to Buffalo and Erie dividends, on which it is alleged the United States tax has been paid by that company, and to inquire what amount of revenue has been derived from that source and carried to the account of earnings.

A. $650,607.43, the tax on which, paid by the Buffalo and Erie company, was $31,274.31.

By Mr. Smyth:

Q. You say you have an account on the books called "Construction account?"

A. We have.

Q. By your method of book-keeping, if any item charged to transportation expenses, or maintaining and operating, should have been charged to construction-account, and were not, is the balance under the head of "Residue each year" just so much less than it would be?

A. Yes, sir.

Q. Will you explain further the memorandum on the paper under consideration: "No deduction made for Buffalo and Erie Railroad Company's dividends and interest, on which the United States tax was paid by that company?"

A. Included in the amount of earnings are certain dividends, and interest on bonds received from the Buffalo and Erie Railroad Company, in which the New York Central Railroad Company was a stock and

bond holder. The taxes on such dividends and interest were paid by the Buffalo and Erie company to the United States.

Q. There is charged each year, to sinking-fund, the sum of $111,082.38, or thereabouts. Will you please state what that fund is for?

A. Those items are expenditures of so much money for the purpose of retiring certain obligations called debt-certificates, issued to the stockholders of the old companies on consolidation in 1853, under the provisions of the consolidation agreement.

Q. Is there anything here under the head of maintaining and operating, which, in your opinion, should have been charged to construction?

A. Nothing.

By Mr. Lathrop:

Q. Have any moneys been expended by the earnings of the road since July 1, 1862, for new bridges, sidings, depots, and engines, and charged to expenses and operating the road?

A. There has been; and, when so charged, the fact is so stated in the annual report.

Q. Did the New York Central Railroad Company contribute toward laying a third rail on the Great Western Railway of Canada?

A. Yes, sir.

35 Q. Have they any ownership?

A. They have not.

Q. To what account is this charged?

A. To expenses.

By Mr. Orton:

Q. It appears, by the paper now under consideration, that, on the 30th September, 1868, there was a balance of $6,630,912 of unappropriated earnings, under the head of "Residue each year." Was that amount on hand applicable to dividends?

A. It was not.

Q. What disposition had been made of it?

A. A part of it had been used on construction-account, and a part was in material and supplies on hand, and part in cash.

Q. At the time this distribution of eighty per cent. in interest-certificates was made, was there not, also, declared a dividend in cash upon the stock of the company, and also upon the interest-certificates?

A. There was.

Q. Was such dividend upon either stock or certificates, or both, paid out of this apparent surplus of $6,630,912?

A. Both were, in part. This Exhibit A shows the state of the company's accounts on the 30th September, 1868, which is the close of the company's fiscal year, as required by the law of the State. The issue of interest-certificates was authorized 19th December, 1868, at which time a dividend in cash of four per cent. was declared on both the capital-stock and the interest certificates.

Q. Is it practicable to separate from the amount of the dividend, on both the capital-stock and the interest-certificates, that portion which was drawn from profits accumulated prior to September 30, 1868?

A. It is practicable to approximate very closely by a pro-rata division of the time. The dividend was declared on both the capital-stock and interest-certificates on the 19th December, 1868, it having been ascertained that the profits then on hand were enough to pay the dividend on both the stock and interest-certificates. A pro-rata division shows that about $1,159,641 was from profits earned between the 30th

September and the 19th of December, leaving a balance of $913,599 taken from profits accumulated previous to the 30th September.

Q. What was the capital-stock?

A. $28,795,000.

Q. The interest-certificates?

A. $23,036,000.

Q. What did the dividend of four per cent. amount to?

A. $2,073,240.

36 Q. Were you an officer of the New York Central Railroad Company at the time of the declaration of this so-called dividend of eighty per cent. in interest-certificates?

A. I was treasurer.

Q. Did you have personal knowledge of what the directors were doing at that time in connection with that matter?

A. I had.

Q. Were you consulted by the committee to which that subject was referred?

A. I was.

Q. Was it your understanding that the issue of those certificates, and their distribution among the stockholders, was a division of profits previously earned in excess of dividends previously declared?

A. It was not.

Q. Was the issue of those certificates based, in any manner, upon the previous earnings of the company?

A. I understood that the issue of eighty per cent. was entirely with reference to the ability of the company to pay dividends in future, without regard to what it had accumulated or acquired up to the time of the issue.

Q. Was there any accumulation of earnings to the credit of any fund other than that entitled "Income-account," and which appears on the paper before us, under the heading "Residue each year," from which a dividend could have been paid?

A. There was not.

By Mr. Smyth:

Q. Will you please turn to the company's report for the year ending September 30, 1862? Do you find there special attention drawn to 14 engines, 483 freight-cars, 9 miles of track, which are charged to transportation expenses?

A. I do.

Q. Do you find it there stated that they are besides ordinary items of general repairs?

A. Yes, sir.

Q. What does that mean?

A. It means simply that these are rather specific items of repairs, as against the ordinary items of general repairs, and attention is called to them in order that those who read the reports will know what the particular items are, and the liberality with which the rolling-stock is kept up. On looking at our construction-account, it will be seen that the cost of all the engines that the company had in 1862 stood in construction-account at a value that would have replaced every engine on the road with a new engine, whereas those on the road were in a

37 condition of ordinary wear—at least half worn out; and the same is true of the cars.

Q. Does the same explanation that you give now apply to the subsequent years?

A. It does, so far as this: That we did not consider our motive-power

and rolling-stock at any of those times of as much value as it stood at in our construction-account.

Q. Did you furnish any inventory of the rolling-stock at the end of each fiscal year?

A. Yes, sir.

Q. I see, in 1864, you charge a new hotel at Buffalo to transportation expenses.

A. That was an appendage to our cattle-yards at that place; and, as matter of ordinary conservatism in railroad-accounts, a piece of property that dilapidates as much as an engine or car in use, or a building of any kind, should not go to construction-account, but to expense-account.

Q. Does the same explanation refer to all the buildings?

A. Yes, sir.

Q. These dividends, as stated here—were they declared and paid free of Government tax.

A. I think there was nothing said about tax, in declaration of dividends, but the tax was paid on the gross amount of each dividend.

Q. To what account of items have tax on dividends been charged?

A. To income-account. We paid each stockholder the rate of dividend declared, and we subsequently paid the tax on the full amount that we paid to the stockholders.

By Mr. Fairchild:

Q. Has any part of the balance of the income, as appears in the statement submitted, been carried to the account of any fund?

A. No part has been carried to the account of any fund.

By Mr. Smyth:

Q. Is it carried to income-account?

A. It stands to the credit of income-account until otherwise disposed of.

(Subsequently Mr. Worcester appeared before the committee, and presented the statement hereto annexed, marked "B.")

By Mr. Orton:

Q. It appears by this Exhibit B, that from the organization of the New York Central Railroad Company to September 30, 1868, there was expended and charged to the cost of road, $14,563,167.62, of which
38 sum $9,521,170.01 was provided by an increase of the capital stock and debt of the company, leaving a balance of $5,041,997.61, which you say, in a memorandum, was taken from traffic receipts. Does this balance constitute a part of the sums which, in the previous exhibit marked "A," stand under the heading "Residue each year?"

A. It does.

E. D. WORCESTER.

NEW YORK, *January* 12, 1872.

Edwin D. Worcester, being duly sworn, says that the foregoing statements subscribed by him, touching the inquiry into the affairs of the New York Central Railroad Company, are true of his knowledge, excepting as to those matters stated on information and belief, and as to such matters he believes them to be true.

Sworn before me this 21st January, 1872.

R. P. LATHROP,
Assessor 14th District, N. Y.

HORACE F. CLARK.

By Mr. Fairchild:

Q. Were you a director of the New York Central Railroad Company in December, 1868?

A. I was.

Q. Were you familiar with the facts and circumstances upon which the interest-certificates, so called, were issued in December, 1868?

A. I was.

Q. Will you state to this committee the facts and circumstances connected with that transaction?

A. In 1868 a committee, of which I was a member, was raised from the board of directors of the New York Central Railroad Company, to inquire as to what increase of capitalization, in some form, might, with propriety, be made to the stockholders; and it was considered and determined that interest-certificates, as they were called, to the amount of eighty per cent. upon the par of the capital stock might justly be given to the stockholders, such certificates to pay the same dividends as the stock, to be convertible into stock at the pleasure of the company, and to be redeemable solely out of future earnings, from time to time, in the pleasure of the company. The point was to ascertain upon what increase of capitalization, in that form, reasonable railroad dividends might be paid—say seven or eight per cent. per annum. There was no ascertainment of profits which had been previously realized. There were estimates of enhanced value resulting from actual advances in the value of the property, and from the general enhancement of all values which followed the suspension of specie payments and the intro-
39 duction of paper currency in the country. Reference was had to the difference of cost of labor and materials. All such matters were taken into account, and it being believed that, under ordinary circumstances, there was reasonable ground for expectation that the company might in the future pay dividends upon a sum equal to eighty per cent. increase of its capital stock, the issue was made. The fact was also taken into consideration, that, at some periods, the stockholders had received inadequate dividends, and there had been a general expectation among the stockholders, for some years, that they might receive some representation of the enhanced value of their property. There was no legal authority to increase the stock, but such authority was subsequently conferred by an act of the legislature of New York.

Q. Has that authority ever been used or exercised?

A. It has not. Dividends were paid upon these interest-certificates, as upon the stock, and the United States tax was paid upon the dividends declared upon the interest-certificates as upon the dividends declared upon the stock. Mr. Worcester, who had for a long period been the treasurer of the company, was called into consultation, and he was of opinion that it was reasonable to expect that, with the growing business of the country, dividends might be earned and paid upon the interest-certificates as well as upon the stock. No injustice was thereby done to stockholders, for the distribution of interest-certificates was confined to them. They had two pieces of paper representing value instead of one. No injustice was done to the Government; on the contrary, the revenue was benefited to the extent of the tax upon the dividends paid upon the interest-certificates.

Q. How many dividends have been paid upon these interest-certificates?

A. Dividends were made in February, 1869, and August, 1869, and the sum of $46,072 was paid to the Government as a tax upon the divi-

dends declared upon the interest certificates, in addition to the tax paid upon the dividends upon the stock.

Q. Did the issuing of these interest-certificates add anything to the actual value of the property of the stockholders?

A. It did not. If the interest-certificates had not been issued, and the same amount of earnings had been realized, larger dividends might have been made upon the stock. The dividends were made upon the two pieces of paper instead of one, a portion to each.

By Mr. Orton:

Q. When the committee of the New York Central Railroad Company had the subject under consideration, was any investigation made to ascertain whether there had been an accumulation of profits not previously divided which would justify a dividend of eighty per cent. out of such profits?

A. No investigation of the kind suggested was made, because it was perfectly well known that there was nothing of which to make actual division. The interest-certificates were to be paid out of future earnings, and dividends thereon were to be paid out of future earnings solely, and the transaction had reference to the future and not to the past. If there had been a surplus that was divisible, it would have been actually divided. No investigations were made beyond such as bore upon the question whether, in the future, the company would, in all reasonable probability, be able to pay dividends upon the interest-certificates. Upon that question we relied upon the best information which we could obtain. There were differences of opinion as to the amount, but it was considered no injustice was done anybody by fixing at random the eighty per cent.

Q. Do you mean to be understood, then, as saying that this so-called dividend of eighty per cent. in interest-certificates was intended to be, and was, in fact, an increase of the capital on which the profits of the company should be distributed in future, in the only way in which the capital stock could be increased at the time, without violation of the laws of the State of New York?

A. You have stated the case precisely. Let me remark upon the subject as to the amount. I think Mr. Worcester, the treasurer, whom we regarded the more intelligent judge of that question, suggested about forty per cent. instead of eighty. There were those who—governed, perhaps, rather by hope for the future than experience in the past—thought it might be fixed at one hundred. Eighty was, however, fixed upon as a compromise of views, all conceding that no possible harm to any existing interest could result from it in the shape in which it was done. The issue of the interest-certificates tended to enhance the speculative market-value of the stock, while, of course, the actual intrinsic value was not in the slightest degree affected. This market-value fluctuated in obedience to the many influences which affect market-values. For some months subsequently to the issue of the interest-certificates in December, 1868, the average increase of market-value was about from ten to fifteen per cent. It has never yet reached par, even in times of wildest speculation.

H. F. CLARK.

NEW YORK, *January* 13, 1872.

Horace F. Clark, being duly sworn, says that the foregoing statements signed by him, touching the inquiry into the affairs of the New York Central Railroad Company, are true of his own knowledge, ex-

cepting as to such matters as are stated on information and
41 belief, and as to such he believes them to be true.

Sworn before me this 13th January, 1872.

RALPH P. LATHROP,
Assessor 14th District, New York.

SIDNEY T. FAIRCHILD.

By Mr. Orton:

Q. What was your official position in the New York Central Railroad Company in December, 1868?

A. Attorney and counsel of the company.

Q. How long had you held that office?

A. Since 1858.

Q. Were you consulted in reference to the issue and distribution of the eighty per cent. of interest-certificates in December, 1868?

A. I was.

Q. Were you consulted officially and professionally on that subject?

A. I was; and I drew the form of the interest-certificates and of the resolutions authorizing their issue.

Q. Please state what was your understanding of the transaction.

A. The object of the company was to diminish the dividend upon the stock, by giving to the stockholders two pieces of paper as the evidence of their several interests in the company, instead of one, and to distribute the net earnings of the company proportionaly to each. So that if the interest of a stockholder in the company were divided into eighteen parts, the stock-certificates would represent ten of those parts and the interest-certificates the remaining eight parts. The interest-certificate was in no respect a representative of undivided earnings. The company, at the time of the issuing of those interest-certificates, was the owner of a property much larger than that acquired by it at its formation in 1853, and it was supposed that larger earnings and dividends could be made in the future than had been made previously.

Q. You were present and heard the statements made to us by Mr. Clark and Mr. Worcester?

A. I was.

Q. Have you anything to say by way of explanation or criticism concerning them?

A. I do not know that I have. I concur with them in their statements substantially.

Q. I hold in my hand what purports to be a copy of the preamble and resolution adopted by the directors of the New York Central Rail-
42 road Company, authorizing the issue of interest-certificates, and also a copy of the certificate. Will you look at it and state whether it is a true copy of the original?

A. I think it is.

Q. The first clause of the preamble declares that the company has "hitherto expended of its earnings moneys equal in amount to eighty per cent. of the capital stock." This declaration seems to justify the inference that the company had accumulated a surplus of earnings equal to eighty per cent. of its capital, which surplus had been invested in the property, which was increased in value to that extent. Was that your meaning?

A. It was not.

Q. Will you explain what it was?

A. The words "expended of its earnings" was a comprehensive term

to embrace not only the moneys which had been expended of actual earnings or derived from loans, but also any increase of value or betterment that had been made to the property, taking into account the debt-certificates, of about nine millions, for which the company was liable, as well as any other additions or improvements to the property that had been made by appropriating money which had been charged to the cost of the road, as appears by the Exhibit B presented by Mr. Worcester, or otherwise.

S. T. FAIRCHILD.

NEW YORK, *January*, 13, 1372.

Sidney T. Fairchild, being sworn, says that the foregoing statement, subscribed by him, touching the inquiry into the affairs of the New York Central Railroad Company, is true of his own knowledge, excepting as to those matters stated on information and belief, and as to such he believes them to be true.

Sworn before me this thirteenth January, 1872.

R. P. LATHROP,
Assessor 14th District, N. Y.

Mr. Fairchild, attorney and counsel for the company, desired to put in the following explanation concerning the annual appropriation for sinking-fund as exhibit on the annexed sheet, marked "A," together with his reasons why the moneys so appropriated should not be treated as gains or profits:

The law of 1853, authorizing consolidation of the railroads between Albany and Buffalo, provided that the capital of the new company should not exceed the aggregate capitals of the companies going into consolidation. The capital of the company, therefore, was fixed at twenty-three millions and eighty-five thousand six hundred dollars, (23,085,600,) which was the aggregate amount of the capitals of
43 the old companies. The stocks of the several companies going into consolidation, at the time of consolidation, were worth in the market about nine millions more than the aggregate capitals of the companies. The stockholders of the old companies were compensated for that excess of value by the debt-certificates. Those debt-certificates are not an absolute obligation against the new company for the amount of them. They are an obligation by which the company is bound to pay the holders of each of them one thousand dollars for each one out of the future income, after the payment of the running expenses, and before dividends. That debt-certificate scheme embraced a sinking-fund of one and one quarter (1¼) per cent. upon the amount of debt-certificates, by which the whole of them would be extinguished within the period for which they had to run, 1883, I believe. The obligation to make this contribution to the sinking-fund was created at consolidation, and it is a part of the obligation which the new company assumed before it could make any dividends. Now, the argument about it is, that the internal-revenue laws tax profits carried to the account of any fund, or used in construction. My idea about it is, that the stockholders of the new company realize no profits until they have complied with the obligation of the debt-certificate scheme. If the new company make nothing except enough to pay its running expenses and to comply with the obligation of the debt-certificate scheme, the new company would make no profit. It does not reach profits until that obligation has been complied with.

JULY 1, 1862.—This act provides that "all dividends in script or money, or sums of money, thereafter declared due or payable to stockholders of any railroad company, as part of the earnings, profits, or gains of said companies, shall be subject to and pay a duty of 3 per centum on the amount of all such interest coupons or dividends, whenever the same shall be paid," and authorizes company to withhold the 3 per cent. from payments to bond or stockholders. (§ 81.)

The same act, § 82, requires banks to pay 3 per cent. tax "on all dividends in scrip or money * * * as part of the earnings, profits, or gains * * * and on all sums added to their surplus or contingent funds."

1864, JUNE 30.—This act provides that any railroad company indebted on any bonds, or that shall have declared any dividend in scrip or money as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund or used for construction, shall pay a duty of 5 per cent. (§ 122.)

Same act imposes a tax of five per cent. on all dividends in scrip or money as part of the earnings, income, or g ins of any bank, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds.

EXHIBIT A.

Statement of revenue (or income) account, New York Central Railroad Company.

From 1st May, 1853, to 1863.	Earnings.	CHARGES AGAINST REVENUE. Maintaining and operating	Interest.	Sinking fund.	U. S. tax on dividends.	Dividends.	U. S. tax on earnings.	Total.	Residue each year.
31th September, 1865	$14,462,595 09	$7,751,142 82	$1,826,166 93	$268,690 75	.....	$4,031,437 58	.....	$13,880,438 08	$588 157 01
30th September, 1856	7,77 ,06 50	4,097,867 18	931,576 95	111,182 38	.....	1,919,564 00	.....	7,060,190 51	712,878 99
30th September, 1857	8,027,250 41	4,497,985 52	970,871 12	113,294 38	.....	1,9 9,564 00	.....	7,501,715 02	525,536 39
30th September, 1858	6,52 ,412 70	3,751,608 30	976 92 18	113,294 38	.....	1,919,564 00	.....	6,760,658 86	*232,246 16
30th September, 1859	6,200,818 82	3,409,429 11	97 ,059 62	116,753 77	.....	1,679,782 00	.....	6,176,024 50	24,824 32
30th September, 1860	6,957,241 01	4,338,840 81	985 272 04	115,266 50	.....	1,440,000 00	.....	6,879,379 35	77,861 66
30th September, 1861	7,309,142 06	4,872 733 51	1,0 1,977 16	114,965 15	.....	1,440,000 00	.....	7,429,675 82	*120,633 76
30th September, 1862	9,356,827 77	5 667,750 31	1,02 ,293 12	113,967 75	.....	1,440,000 00	.....	8,242,911 20	1,113,916 57
Total	$66,621,288 26	$38,390,357 58	$8,683,3 9 12	$1,067,415 06	.....	$5,789,911 58	.....	$63,930,993 34	(1) $2,690,295 02
30th September, 1863	$10,297,61 38	$6,982,082 54	$998,140 49	$112,060 02	Out of earn's	$1,680,000 00	$50,400 00	$9,822,683 05	$1,074,948 33
30th September, 1864	12,997,889 83	9,406,184 36	1,026,765 38	111,182 38	$84,959 88	2,193,850 00	85,323 50	12,908,265 50	89,624 33
Total	$23,895,520 21	$16,388,266 90	$2,024 905 87	$223,242 40	$84,959 88	$3,873,850 00	135,723 50	$22,730,948 55	(2) $1,164,572 66
30th September, 1865	$13,975,524 39	$10,942,358 09	$974,169 26	$111,182 38	$338,451 85	$1,469,460 00	$73,473 00	$13,909,094 58	$66,429 81
30th September, 1865	14,596,785 68	11,773,441 24	1,019,995 85	112,102 38	322,232 00	1,478,460 00	73,923 00	14,110,154 47	486,631 21
30th September, 1867	13,979,514 00	10,769 359 05	943,880 66	111,182 58	100,353 88	1,652,220 00	82,611 00	13,659,606 97	319,907 03
30th September, 1868	14,381,303 38	9,298,162 87	857,8 2 68	111,182 38	100,830 26	2,009,760 00	100,488 00	12,478,226 19	1,903,077 19
Total	$56,933,127 45	$42,083,321 25	$3,8 5,848 45	445,649 52	$861,867 99	$6,609,900 00	$330,495 00	$54,157,082 21	(3) $2,776,045 24
									(1) $2,690,295 02
								(2) 1,164,572 66	
								(2) 2,776,045 24	
									3,940,617 90
									$6,630,912 92

* Loss. MEMORANDUM. The company was formed on 1st May, 1853, by the consolidation of ten separate companies, forming the line between Albany, Troy, Buffalo, and Suspension Bridge. The deduction made in the above statement of earnings for Buffalo & Erie Railroad Co., dividends and interest, on which the U. S. tax was paid by that company, $550,607.43. Compiled from the books and official records of the company.

DECEMBER 27, 1867

E. D. WORCESTER.

45 EXHIBIT B.

Cost of road, 1853	$22,044,529 25	
Cost of road, 1862	31,787,397 80	
Increase		$9,742,868 55
Received from installments on stock in the old companies, unpaid at consolidation		$3,486,250 00
1853	$23,085,600 00	
Increase of capital stock, 1862	24,000,000 00	
		914,400 00
1853	$11,564,033 62	
Increase of funded debt, 1862	14,279,593 37	
		2,715,559 75
From earnings of road. (part of "residue" of "income")		2,626,658 80
		9,742,868 55
Cost of road, 1862	$31,787,397 80	
Cost of road, 1864	32,879,251 38	
Increase		$1,091,853 58
1862	$24,000,000 00	
Increase of capital stock, 1864	24,386,000 00	
		386,000 00
1862	$14,279,593 37	
Decrease of funded debt, 1864	13,842,543 74	
		437,049 63
Add		51,049 63
From earnings of road, (part of "residue" of "income")		1,142,903 21
Cost of road, 1864	$32,879,251 38	
Cost of road, 1868	36,607,696 87	
Increase		$3,728,445 49
1864	$24,386,000 00	
Increase of capital stock, 1868	28,780,000 09	
		4,394,000 00
46 Increase of capital stock, 1864	$13,842,543 74	
Decrease of funded debt, 1868	11,904,553 63	
		$1,937,990 11
Deduct		2,456,009 89
From earnings of road, (part of "residue" of "income")		$1,272,435 60

SUMMARY.

Cost of road, 1853	$22,044,529 25	
Cost of road, 1868	36,607,696 87	
Increase		$14,563,167 62

Installments on stock in the old companies unpaid at consolidation		$3,486,250 00
1853	$23,085,600 00	
Increase of capital stock, 1868	28,780,000 00	
		5,694,400 00
1853	$11,564,033 62	
Increase of funded debt, 1868	11,904,553 63	
		340,520 01
		$9,521,170 01
From earnings of road, (part of "residue" of "income:")		
1853 to 1862	$2,626,658 80	
1862 to 1864	1,142,903 21	
1864 to 1868	1,272,435 60	
		$5,041,997 61
		$14,563,167 62

	Residue of income.	In road.	Balance.
1853 to 1862	$2,690,295 02	$2,626,658 80	$63,636 22
1862 to 1864	1,164,572 66	1,142,903 21	21,669 45
1864 to 1868	2,776,045 24	1,272,435 60	1,503,609 64
	$6,630,912 92	$5,041,997 61	$1,588,915 31

JANUARY 4, 1872. E. D. WORCESTER.

47 EXHIBIT C.

Statement of items and amounts charged to the account of "maintaining and operating," which seem to belong in construction or cost of road account.

For year ending Sept. 30, 1862:	
9 miles track, at $6,000	$54,000
For year ending Sept. 30, 1863:	
8 95-100 miles track, at $6,000	$53,700
Cattle-yards at Buffalo	25,000
	$78,700
For year ending Sept. 30, 1864:	
10 38-100 miles track, at $6,000	$61,680
Cattle-yards, Buffalo	48,000
Hotel, Buffalo	22,500
Barn and shed, East Buffalo	2,300
Dining-room, Buffalo	8,300
Engine-house, Niagara Falls	9,000
Cattle-yards, Suspension Bridge	3,500
	$155,280
For year ending Sept. 30, 1865:	
Freight-house, Green Island, Troy	$12,000
Engine-house, Rome	1,100

Boiler-shop, Syracuse	9,000
	$22,100

For year ending Sept. 30, 1866:

Buildings, West Albany	$44,000
Coal-sheds, Schenectady	11,000
Engine-house, Rochester	19,000
Freight-house, Glenville	6,000
	$80,000

48 For year ending Sept. 30, 1867:

Car-shop, Niagara Falls	$4,000
Freight-house, Syracuse	26,000
Engine-house, Auburn	7,600
Cattle-yards, Buffalo	24,600
Cattle-yards, West Albany	41,460
Hotel, West Albany	11,000
Passenger-depot, Chittenango	3,000
	$117,660

For year ending Sept. 30, 1868:

Cattle-yards, West Albany	$31,000
Hotel, West Albany	17,000
Freight-house, Amsterdam	13,000
Passenger-house, Amsterdam	6,000
Engine-house, St. Johnsville	36,200
Freight-house, Little Falls	19,000
Passenger-house, Fonda	6,000
Passenger-house, Palatine Bridge	3,500
Engine-house, West Albany	9,900
	$141,600

49 United States circuit court, northern district of New York.

THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company
vs.
JOHN M. BAILEY.

And the said defendant, John M. Bailey, by Richard Crowley, his attorney, comes and defends the wrong and injury when, &c., and says he is not guilty of the said supposed grievances laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff, the New York Central and Hudson River Railroad Company, hath above complained against him, and denies each and every allegation contained in said declaration or complaint, and of this he puts himself upon the country, &c.

RICHARD CROWLEY,
Atty. for Defendant, Lockport, N. Y.

50 To S. T. FAIRCHILD, *Plaintiff's Attorney.*

SIR: Please to take notice that the said defendant, at the trial of the above cause, will insist upon and give in evidence, under the general issue above pleaded, that the said defendant, John M. Bailey, was at all times mentioned in the said declaration or complaint herein the collector of internal revenue in & for the fourteenth collection-district of the State of New York, duly appointed, qualified, and acting as such, pursuant to the statutes of the United States of America, and that the alleged acts and grievances complained of in and by said declaration or complaint were done, if at all, by said defendant as such collector as aforesaid, in his official capacity in the discharge of his duty as such collector, and in pursuance of the statutes of the United States of America authorizing the same for violations of the laws of the United
51 States of America, and not otherwise or different.

That on the 19th day of December, 1868, the New York Central Railroad Company was a corporation duly created, organized, and doing business as such under the laws of the State of New York, and operating and maintaining its road in and from the city of Albany to the city of Buffalo and Niagara Falls, in the northern district of New York, and having its principal office at the city of Albany, in the fourteenth collection-district aforesaid.

That on the said 19th day of December, 1868, at the city of Albany, in the fourteenth collection-district aforesaid, the said the New York Central Railroad Company, by resolution of its board of directors, declared, issued, divided, and delivered a dividend to its stockholders, in scrip or interest-certificates, to the amount of $23,036,000, as part
52 of the earnings, profits, income, or gains of said corporation.

That on the 20th day of May, 1869, the said action of said corporation in declaring, issuing, dividing, and delivering said scrip, dividend, or interest-certificates to its stockholders was legalized by an act of the legislature of the State of New York, entitled "An act authorizing the increase of the stock of the New York Central Railroad Company."

That on the 1st day of November, 1869, the said "The New York Central Railroad Company," under authority of an act of the legislature of the State of New York entitled "An act authorizing the consolidation of certain railroad companies," passed May 20, 1869, was consolidated with the "The Hudson River Railroad Company," and the two companies were thenceforward known as "The New York Central
53 & Hudson River Railroad Company," the name of the plaintiff in this action, and operated and maintained its road from the city of New York to the city of Buffalo and Niagara Falls, running through, and having its principal office in, the city of Albany, in the fourteenth collection-district aforesaid.

That, in and by said act of consolidation, the rights of all creditors of and all liens upon the property of either of said corporations were preserved unimpaired, and the respective corporations were deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of said corporations, except mortgages, thenceforth attached to said new corporation, and were to be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it.

That neither the said the New York Central Railroad Company
54 nor the said the New York Central & Hudson River Railroad Company ever made any list or return to the assessor or assistant assessor of the said fourteenth collection-district to any assessor or as-

sistant assessor under the internal-revenue laws of the United States of America of said dividend, in scrip or interest-certificate, so as aforesaid declared, issued, divided, delivered to its stockholders, or paid any tax thereon under the internal-revenue laws of the United States of America, except as hereinafter stated.

That, on the 3d day of March, 1870, Ralph P. Lathrop was, and for some months prior thereto had been, assessor of internal revenue under the internal-revenue laws of the United States of America, duly appointed, qualified, and acting as such assessor in and for the fourteenth collection-district aforesaid, and continued to be such assessor in and for said fourteenth collection-district down to the 1st day of March, 1873.

55 That, on said 3d day of March, 1870, said Lathrop, as such assessor, by Wm. H. Quackenboss, an assistant assessor in and for said fourteenth collection-district, and by himself acting in his official capacity, duly assessed the said the New York Central Railroad Company, under the internal-revenue laws of the United States of America, upon said scrip-dividend or interest-certificates was aforesaid declared, issued, divided, and delivered to its stockholders the sum of $1,151,800, being five per centum upon said sum of $23,036,000, and also $1,000 penalty for default in making list or return to the assessor or assistant assessor as aforesaid, and duly notified in writing the said the New York Central Railroad Company and this plaintiff of such assessment.

56 That said Lathrop, as such assessor, duly transmitted and delivered the assessment-roll containing said assessment to this defendant, as such collector in and for said fourteenth collection-district, for collection.

That thereafter, and on the 4th and 15th days of March, 1870, this defendant, as such collector, and in the discharge of official duty under the internal-revenue laws of the United States of America, prepared and served upon said the New York Central Railroad Company and upon this plaintiff notices in writing, in due form of law, of said assessment so as aforesaid assessed, and transmitted to him for collection, and demanding payment thereof at and within the time required by said internal-revenue laws.

That the said the New York Central Railroad Company and this plaintiff refused to pay the same.

57 That thereupon this plaintiff appealed from said assessment to the Commissioner of Internal Revenue.

That said appeal was duly considered by said Commissioner of Internal Revenue, and by him, as such Commissioner, said penalty of $1,000 was remitted, and said assessment was reduced from said sum of $1,151,800 to the sum of $460,720, and said assessment, as thus reduced by said Commissioner, was duly entered and noted upon said assessment-roll, and the same was transmitted and delivered to this defendant as such collector for collection.

That thereafter notice and demand of the payment of said sum of $460,720, under said assessment, were duly given and made by this defendant as such collector to and of said the New York Central Railroad Company and to and of this plaintiff.

58 That payment thereof was refused; that thereafter, and on the 30th day of March, 1873, at the city of Albany, in said collection-district, this defendant, as such collector, issued to H. J. Cornell, deputy collector of internal revenue in and for said fourteenth collection-district, his warrant in due form of law, commanding said Cornell as such deputy collector, to collect said sum of $460,720 by distraint in due form of

law from said the New York Central Railroad Company, or from said plaintiff, the New York Central & Hudson River Railroad Company.

That thereafter, under such distraint and under protest, said plaintiff paid to this defendant, as such collector as aforesaid, the several sums of money at the times mentioned in said declaration or complaint herein.

59 That before the commencement of this action this defendant, as such collector, pursuant to law and the regulations of the Treasury Department of *the Treasury of* the United States of America, paid said several sums of money, so received by him, into the Treasury of the United States of America.

RICHARD CROWLEY,
Deft's Atty., Lockport, N. Y.

60 United States circuit court, northern district of New York.

THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company
vs.
JOHN M. BAILEY.

And the said plaintiff, as to the plea of the said defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like.

S. T. FAIRCHILD,
Of Albany, Plaintiffs' Attorney.

61 United States circuit court, northern district of New York.

THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company
vs.
JOHN M. BAILEY.

And the said defendant, John M. Bailey, by Richard Crowley, his attorney, comes and defends the wrong and injury, when, &c., and for an amended plea says that he is not guilty of the said supposed grievances laid to his charge, or any or either of them, or any part thereof, in manner and form, as the said plaintiff, the New York Central and Hudson River Railroad Company, hath above complained against him, and denies each and every allegation contained in said declaration or complaint; and of this he puts himself upon the country, &c.

RICHARD CROWLEY,
Atty. for Defendant, Lockport, N. Y.

To S. T. FAIRCHILD, Esq.,
Plaintiff's Attorney:

SIR: Please take notice that the said defendant, at the trial of above cause, will insist upon and give in evidence under the amended general issue above pleaded and under this amended notice, that the said defendant, John M. Bailey, was, at all the times mentioned in the said declaration or complaint herein, the collector of internal revenue

62 in and for the fourteenth collection-district of the State of New York, duly appointed, qualified, and acting as such, pursuant to the statutes of the United States of America, and that the alleged acts and grievances complained of in and by said declaration or complaint

were done, if at all, by said defendant as such collector as aforesaid, in his official capacity, in the discharge of his duty as such collector, and in pursuance of the statutes of the United States of America authorizing the same, for violations of the laws of the United States of America, and not otherwise or different.

That on the 19th day of December, 1868, the New York Central Railroad Company was a corporation duly created, organized, and doing business as such under the laws of the State of New York, and operating and maintaining its road in and from the city of Albany, to the city of Buffalo and Niagara Falls, in the northern district of New York, and having its principal office in the city of Albany, in the fourteenth collection-district aforesaid.

That on the said 19th day of December, 1868, at the city of Albany, in the fourteenth collection-district aforesaid, the said the New York Central Railroad Company, by resolutions of its board of directors, declared, issued, divided, and delivered a dividend to its stockholders in scrip or interest-certificates to the amount of $23,036,000, as part of the earnings, profits, income, or gains of said corporation.

That on the 20th day of May, 1869, the said action of said corporation in declaring, issuing, dividing, and delivering said scrip, dividend, or interest-certificates to its stockholders was legalized by an act of the legislature of the State of New York, entitled "An act authorizing the increase of the stock of the New York Central Railroad Company."

63 That on the first day of November, 1869, the said the New York Central Railroad Company, under authority of an act of the legislature of the State of New York, entitled "An act authorizing the consolidation of certain railroad companies," passed May 20, 1869, was consolidated with the Hudson River Railroad Company, and the two companies were thenceforward known as New York Central & Hudson River Railroad Company, the name of the plaintiff in this action, and operated and maintained its road from the city of New York to the city of Buffalo and Niagara Falls, running through and having its principal office in the city of Albany, in the fourteenth collection-district aforesaid.

That in and by said act of consolidation the rights of all creditors of and liens upon the property of either of said corporations were preserved unimpaired, and the respective corporations were deemed to continue in existence, & to preserve the same and all debts and liabilities incurred by either of said corporations, except mortgages, thenceforth attached to said new corporations, and were to be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it. That neither the said the New York Central Railroad Company, nor the said the New York Central & Hudson River Railroad Company, ever made any list or return to the assessor or assistant assessor of the said fourteenth collection-district, or to any assessor or assistant assessor under the internal-revenue laws of the United States of America, of said dividend in scrip or interest-certificates, so as aforesaid declared, issued, divided, and delivered to its stockholders, or paid any tax thereon, under the internal-revenue laws of the United States of America, except as hereinafter stated. That on the third day

64 of March, 1870, Ralph P. Lathrop was, and for some months thereto had been, assessor of internal revenue under the internal-revenue laws of the United States of America, duly appointed, qualified, and acting as such assessor in and for the fourteenth collection-district aforesaid, and continued to be such assessor in and for said fourteenth collection-district down to the first day of March, 1873.

That on said third day of March, 1870, said Lathrop, as such assessor, by William H. Quackenboss, an assistant assessor in and for said fourteenth collection-district, and by himself acting in his official capacity, duly assessed the said the New York Central Railroad Company, under the internal-revenue laws of the United States of America, upon said scrip-dividends or interest-certificates so as aforesaid declared, issued, divided, and delivered to its stockholders, the sum of $1,151,800, being five per centum upon said sum of $23,036,000, and also $1,000 penalty for default in making list or return to the assessor or assistant assessor as aforesaid, and duly notified in writing the said the New York Central Railroad Company and this plaintiff of such assessment.

That said Lathrop, as such assessor, duly transmitted and delivered the assessment-roll containing said assessment to this defendant, as such collector in and for said fourteenth collection-district, for collection.

That thereafter, and on the 4th and 15th days of March, 1870, this defendant, as such collector and in discharge of official duty, under the internal-revenue laws of the United States of America, prepared and served upon said the New York Central Railroad Company, and upon the plaintiff, notices in writing, in due form of law, of said assessment so as aforesaid assessed and transmitted to him for collec-
65 tion, and demanding payment thereof as and within the time required by said internal-revenue laws. That the said the New York Central Railroad Company and this plaintiff refused to pay the same.

That thereafter the Commissioner of Internal Revenue, as such Commissioner, remitted said penalty of $1,000, and reduced said assessment from said sum of $1,151,800 to the sum of $460,720, and said assessment, as thus reduced by said Commissioner, was duly entered and noted upon said assessment-roll, and this defendant, as such collector, was, by said Commissioner, ordered and directed to collect the same as thus corrected.

That thereafter notice and demand of payment of said sum of $460,720, with interest and percentage thereon under said assessment, were duly given and made by this defendant, as such collector, to and of said the New York Central Railroad Company, and to and of this plaintiff.

That payment thereof was refused.

That thereafter, and on the 30th day of March, 1873, at the city of Albany, in said collection-district, this defendant, as such collector, issued his warrant in due form of law for the collection of said sum of $460,720, with interest, percentage, fees, and expenses, by distraint in due form of law from said the New York Central Railroad Company, or from this plaintiff.

That thereafter, under such distraint and under protest, said plaintiff paid to this defendant, as such collector as aforesaid, the several sums of money at the times mentioned in said declaration or complaint herein.

That before the commencement of this action this defendant, as such collector, pursuant to law and the regulations of the Treasury Depart-
ment of the United States of America, paid said several sums of
66 money, so received by him, into the Treasury of the United States of America.

RICHARD CROWLEY,
Deft.'s Attorney, Lockport N. Y.

67 United States circuit court, northern district of New York.

THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company *agt.* JOHN M. BAILEY.

And the said plaintiff, as to the amended plea of the said defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like.

S. T. FAIRCHILD, *of Albany, Plaintiff's Attorney.*

68 This cause having been tried at a term of this court, held at Canandaigua, commencing on the 16th day of June, 1874, and a verdict having been rendered therein in favor of the plaintiff against the defendant on the 1st day of July, 1874, for the sum of five hundred and ninety-four thousand and two dollars and eighty-nine cents:

Now, therefore, it is considered that the said plaintiff, The New York Central and Hudson River Railroad Company, do recover against said defendant, John M. Bailey, the damages of the said plaintiff by the jurors aforesaid in form aforesaid assessed, and also the further sum of six thousand nine hundred and seventy-eight dollars and twenty-three cents, for the costs and charges of said plaintiff, by the court here adjudged, of increase to the said plaintiff with its assent, which said damages, costs, and charges in the whole amount to six hundred thousand nine hundred and eighty-one dollars and twelve cents.

And the said defendant in mercy, &c.

Judgment signed this 1st day of September, A. D. 1874.

CHARLES MASON, *Clerk.*

69 (Endorsed:) U. S. circuit court, northern district of N. Y. The New York Central and Hudson River Railroad Company vs. John M. Bailey. Judgment record. S. T. Fairchild, plff's. atty. Damages, $594,002.89; costs, $6,978.23; total, $600,981.12. Filed September 1, 1874, 2 o'clock p. m.

70 United States circuit court, second circuit, northern district of New York.

THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company *vs.* JOHN M. BAILEY.

Bill of exceptions.

The pleadings herein are made a part hereof, without being inserted herein, and are to be hereto prefixed.

Afterwards, to wit: At a term of said court, held at the court-house in the village of Canandaigua, in and for said district, on the third Tuesday of June, A. D., 1874, before the honorable William J. Wallace, judge of the said court, and a jury, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried, at which day and place came as well the said plaintiff as the said defendant, by their attorneys aforesaid, and the jurors of the jury aforesaid impanneled to

try the said issue being called, also came, and were then and there, in due manner, chosen and sworn to try the said issue.

And upon the said trial the counsel for said plaintiff, to maintain the issue on his part, then and there produced and read in evidence
71 an act of the legislature of the State of New York, of which the following is a true copy:

CHAP. 917.

An act authorizing the consolidation of certain railroad companies, passsed May 20, 1869.

The People of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. It shall and may be lawful for any railroad company or other corporation organized under the laws of this State, or of this State and any other State, and operating a railroad or bridge, either wholly within, or within and partly without this State, to merge and consolidate its capital stock, franchises, and property with the capital, stock, franchises, and property of any other railroad company or companies organized under the laws of this State, or under the laws of this State and any other State, or under the laws of any other State or States, whenever the two or more railroads of the companies or corporations so to be consolidated shall or may form a continuous line of railroad with each other, or by means of any intervening railroad-bridge or ferry.

§ 2. Said consolidation shall be made under the conditions, provisions, and restrictions, and with the powers hereinafter in this act mentioned and contained, that is to say:

1. The directors of the companies proposing to consolidate may enter into a joint agreement, under the corporate seal of each company, for the consolidation of said companies and railroads, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and other officers thereof, and who shall be the first directors and officers, and their places of residence, the number of shares of the capital stock, the amount or par value of each share, and the maner of converting the capital stock of each of the said companies into that of the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and the consolidation of said companies or railroads.

2. Said agreement shall be submitted to the stockholders of each of the said companies or corporations at a meeting thereof called separately for the purpose of taking the same into consideration; due notice of the time and place of holding said meeting, and the object thereof, shall be given by each company to its stockholders by written or printed notices addressed to each of the persons in whose names the capital stock of such company stands on the books thereof, and deliver
72 to such persons respectively, or sent to them by mail when their post-office address is known to the company, at least thirty days before the time of holding such meeting, and also by a general notice published daily for at least four weeks in some newspaper printed in the city, town, or county where such company has its principal office or place of business; and at the said meeting of stockholders the agreement of the said directors shall be considered, and a vote by ballot taken for the adoption or rejection of the same, each share entitling the

holder thereof to one vote, and said ballots shall be cast in person or by proxy, and if two-thirds of all the votes of all the stockholders shall be for the adoption of said agreement, then that fact shall be certified thereon by the secretaries of the respective companies, under the seal thereof, and the agreement so adopted, or a certified copy thereof shall be filed in the office of the secretary of state, and shall from thence be deemed and taken to be the agreement and act of consolidation of said companies, and a copy of the said agreement and act of consolidation, duly certified by the secretary of state, under his official seal, shall be evidence in all courts and places of the existence of said new corporation, and that the foregoing provisions of this act have been fully observed and complied with.

§ 3. Upon the making and perfecting such agreement and act of consoli, dation, as hereinbefore provided, and filing the same, or a copy thereof, in the office of the secretary of state as aforesaid, the said corporations parties thereto, shall be deemed and taken to be one corporation by the name provided in said agreement and act; but such act of consolidation shall not release such new corporation from any of the restrictions, disabilities, or duties of the several corporations so consolidated; but nothing in this act contained shall allow any rate of fare for way-passengers greater than two cents per mile to be charged or taken over the track or tracks of that railroad now known as the New York Central Railroad Company; and the rate of fare for way-passengers over the track or tracks now operated by the said New York Central Railroad Company shall continue to be two cents per mile and no more, wherever it is now restricted to that rate of fare; but nothing herein contained shall apply to street-railroads.

§ 4. Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions, and franchises of each of said corporations parties to the same, and all the property, real, personal, and mixed, and all debts due on whatever account to either of said corporations, as well as all stock-subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed, and all claims, demands, property,
73 rights of way and every other interest shall be as effectually the property of the new corporations as they were of the former corporations, parties to the said agreement and act, and the title to all real estate, taken by deed or otherwise, under the laws of this State vested in either of said corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation.

§ 5. The rights of all creditors of, and all liens upon, the property of either of said corporations, parties to said agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of said corporations, except mortgages, shall thenceforth attach to such new corporation, and be enforced against it and its property, to the same extent as if said debts or liabilities had been incurred or contracted by it. No suit, action, or other proceeding now pending before any court or tribunal, in which either of said railroad companies is a party, shall be deemed to have abated or been discontinued by the agreement and act of consolidation as aforesaid, but the same may be conducted in the name of the existing corporations to final judgment, or such new corporation may be, by order of the court,

on motion, substituted as a party. Suits may be brought and maintained against such new corporation in the courts of this State, for all causes of action, in the same manner as against other railroad corporations therein.

§ 6. The real estate of such new corporations situate within this State shall be assessed and taxed in the several towns and cities where the same shall be situated, in like manner as the real estate of other railroad corporations is, or may be taxed and assessed, and such proportion of the capital stock and personal property of such new corpoation shall in like manner be assessed and taxed in this State, as the number of miles of its railroads situate in this State bears to the number of miles of its railroads situate in the other State or States.

§ 7. Nothing in this act contained shall be so construed as to allow such consolidated company to charge a higher rate of fare per passenger, per mile, upon any part or portion of such consolidated line, than is now allowed by law to be charged by each existing company, respectively; nor shall this act apply to street-railroads. And nothing in this act contained shall be so construed as to affect or impair, in any way, the validity of any contract now existing between the Buffalo and State Line Railroad Company and the New York and Erie Railroad Company.

§ 8. All the provisions of the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same,"
74 passed April second, eighteen hundred and fifty, and of the several acts amendatoy thereof, or in addition thereto, shall be applicable to the new corporation so to be formed as aforesaid, so far as the same are now applicable to the railroad companies of this State, which may be consolidated with any other company or companies, by virtue of this act.

§ 9. No companies or corporations of this State, whose railroads run on parallel or competing lines, shall be authorized by this act to merge or consolidate.

§ 10. This act shall take effect immediately.

It was admitted upon said trial, by and between the counsel for the respective parties, that the plaintiff was and is a railroad corporation, as alleged in its declaration, and organized under said chapter 917 of the Laws of the State of New York, and had been such since the first day of November, 1869, by the name of "The New York Central and Hudson River Railroad Company."

It was also admitted that the plaintiff was created and organized by a consolidation of the New York Central Railroad Company with the Hudson River Railroad Company, under said chapter 917, on the first day of November, 1869, and that from that day the New York Central Railroad Company ceased to exist, except for certain purposes specified in the act aforesaid.

It was further admitted upon said trial, by and between the counsel for the respective parties, that the defendant, John M. Bailey, seized, and on the 22d day of March, 1873, sold, seventeen locomotive engines and tenders belonging to the plaintiff, and received therefor, on such sale, the sum of seventeen thousand dollars; that afterwards said defendant seized eight other locomotive engines and tenders belonging to the plaintiff, and on the 23d day of April, 1873, sold the same, and received therefor, on such sale, the sum of twenty-two thousand seven hundred and fifty dollars; and that afterwards said defendant seized
75 twenty-three other locomotive engines and tenders, thirty-six passenger-coaches, and three baggage-cars, all the property of

the plaintiff, and advertised the same for sale, and threatened to seize and sell other property of the plaintiff.

That thereupon the plaintiff, for the purpose of avoiding the sale of its property by the defendant, on the 13th day of May, 1873, paid to the defendant, under protest, the sum of four hundred forty-six thousand two hundred seventy dollars and twelve cents, and on the 17th day of May, 1873, the plaintiff paid to said defendant, under protest, the further sum of sixty-four thousand one hundred fifty-three dollars and forty-eight cents.

That said protests were in writing and were delivered to said defendant at the times of said payments respectively, and copies of said protests are annexed to the declaration in this action, and marked respectively "E" and "F."

That said seizures and sales of the property of the plaintiff by the defendant were respectively forbidden by the plaintiff at the times of such seizures and sales. That said sales were forbidden by written notices read and delivered to said defendant at the times of sales and before said sales had been made respectively, of which notices the following are copies:

To John M. Bailey, and all others concerned:

Please take notice that the sale of the engines and tenders advertised in the printed notice hereto annexed is forbidden. Said engines are the property of the New York Central and Hudson River Railroad Co. The pretended tax under which sale is proposed was assessed against the New York Central Railroad Co. after said company had ceased to exist. Said sale and said pretended tax are illegal and unathorized against either of the said railroad companies, and the owner of said property will use all legal means to protect its rights therein.

Dated, March 22, 1873.

THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD CO.,
By S. T. FAIRCHILD, *Attorney.*

76 Annexed to this is the notice of the defendant Bailey, therein referred to, which reads as follows:

COLLECTOR'S OFFICE, 14 DISTRICT, NEW YORK,
Albany, March 8, 1873.

Whereas, distraint has this 8th day of March, 1873, been made against the following property, located at Albany, namely: "Locomotive engine and tender No. 95, shop No. 55; locomotive engine and tender No. 17, shop No. 48," (and so going on and giving a list of 17 locomotives and tenders from the New York Central or the New York Central and Hudson River Railroad Co.,) for non-payment of tax due to the United States. Notice is hereby given, in pursuance of the provisions of the act of Congress entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June 30, 1864, and the several acts amendatory thereof, that I will expose for sale at public auction the above-mentioned property, at my office, No. 59 State st., in the city of Albany, on the 22nd day of March, 1873, at 12 o'clock at noon.

JOHN M. BAILEY, *Collector*,
By H. J. CONNELL, *Deputy.*

The other notice reads as follows:

To JOHN M. BAILEY, and all others concerned:

Please take notice that the sale of the engines and tenders advertised

in the printed notice hereto annexed is forbidden. The said engines and tenders are the property of the New York Central and Hudson River Railroad Co. The pretended tax under which said sale is proposed was assessed against the New York Central Railroad Co. after said company had ceased to exist. Said sale and said pretended tax are illegal and unauthorized against either of said railroad co.'s, and the owner of said property will use all legal means to protect his rights therein.

Dated April 3, 1873.

THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD CO.,
By S. T. FAIRCHILD, *Attorney.*

Annexed to this is a notice similar to the one annexed to the other, containing a list of eight locomotives and tenders, and a notice that they will be sold at public auction on the 12th of April, 1873. That sale was postponed until the 23d of April.

77 It was further admitted upon said trial, by and between the counsel for the respective parties, that the plaintiff, in due time and form, presented to the proper officer of the United States and filed a refunding claim or appeal, for the refunding and abatement of the tax and all parts thereof mentioned in the pleadings in this cause, and that the plaintiff, in that behalf, complied in season with the statute in such cases made and provided.

The counsel for the plaintiff then rested.

The counsel for the defendant, to maintain the said issue on his part, thereupon called Ralph P. Lathrop, who, being sworn as a witness, and examined by the defendant's counsel, testified:

I reside in the city of Albany, and did in March, 1870; I was assessor of internal revenue for the fourteenth district of New York from November 16th, 1869, until May 20th, 1873. The principal office for the transaction of the business of the New York Central Railroad Company was, before its consolidation with the Hudson River Railroad Company, at the city of Albany, in the fourteenth internal-revenue district. On the 26th day of February, 1870, I served on Charles Wendell, esq., acting treasurer of the New York Central Railroad Company, at the treasurer's office of the company, in the city of Albany, a written notice, of which the following is a true copy:

ASSESSOR'S OFFICE, 14TH DISTRICT, N. Y.,
Albany, February 26th, 1870.

SIR: I am directed by the Commissioner of Internal Revenue, through the supervisor of the northern district of New York, to cause an assessment of taxes against the New York Central Railroad Company, upon the scrip dividend issued by resolution of the board of directors of said company, Dec. 19th, 1868.

78 I am also requested to furnish the supervisor the names of persons to whom such scrip was issued. Will you please furnish me with amount of such dividend, and the names of the persons to whom the scrip was issued?

Respectfully,

R. P. LATHROP, *Assessor.*

CHAS. WENDELL, Esq.,
Acting Treasurer N. Y. Central R. R. Co.

I received no answer, response, or information from Mr. Wendell nor

from the New York Central Railroad Company in reply to the foregoing notice.

On the 3d day of March, 1870, I made an assessment against the New York Central Railroad Company. I have the assessment with me.

The counsel for the defendant then offered said assessment in evidence.

The assessment was then received and read in evidence, and reads as follows:

UNITED STATES INTERNAL REVENUE.

Assessment against the New York Central Railroad Company.

The New York Central Railroad Company having failed to make return of the scrip-dividend or interest-certificates voted at a meeting of the directors of said company held Dec. 19th, 1868, as required to do by section 122, act June 30th, 1864, act July 13th, 1866, internal-revenue laws:

Now, therefore, by the authority vested in me, and as required by the several sections of said internal-revenue laws, I do assess against the president, directors, and company of the New York Central Railroad the following tax, to wit:

Capital stock, Dec. 19th, 1868	$28,795,000
Scrip-dividend or interest-certificates, being 80 per cent. of said capital	23,036,000
Tax on same, at 5 per cent	1,151,800
Penalty for failure, (section 122)	1,000
Amount of tax	$1,152,800

RALPH P. LATHROP,
Assessor 14th District, N. Y.

ALBANY, *March 3d*, 1870.

79 On the 4th day of March, 1870, I delivered the assessment to John M. Bailey, the defendant herein, at the city of Albany. He was then the collector of internal revenue for the fourteenth internal-revenue district of the State of New York.

That assessment was subsequently reduced by the Commissioner of Internal Revenue, J. W. Douglass. I received written instructions from the Commissioner, and now produce those instructions.

The counsel for the defendant then offered in evidence such written instructions produced by the witness.

The written instructions were then received and read in evidence, and read as follows:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, February 24, 1872.

SIR: In the matter of the assessment against the New York Central Railroad Company, amounting to $1,152,800 tax, including $1,000 penalty, on the scrip-dividend of $23,036,000, declared December 19, 1868, I have to say that after hearing counsel for the company on the appeal made to me in the case, I have concluded that the company is liable to a tax of five per cent. (without penalty) on the sum of nine million two hundred and fourteen thousand four hundred dollars, ($9,214,400,) being six-fifteenths of the entire dividend, the proportionate amount chargeable to the periods between September 30th, 1862,

and September 30th, 1868. This will reduce the assessment to the sum of four hundred and sixty thousand seven hundred and twenty dollars, ($460,720,) which I have instructed Collector Bailey to collect. On its payment and the presentation of the proper vouchers, the remainder of the assessment, viz, $692,080, including the $1,000 penalty, will be abated.

Very respectfully, yours,

J. W. DOUGLASS, *Commissioner.*

R. P. LATHROP, *Assessor 14th District, Albany, N. Y.*

Said witness, Lathrop, on his cross-examination, testified: I made the assessment dated March 3, 1870, on the day it bears date, in my office. No one else was present. I ascertained the amount of the scrip-dividend from an assembly document. I did nothing in regard to said
80 assessment except to write the paper dated March 3, 1870, and to hand it the next day to the defendant, and serve the notices on Mr. Wendell, as I have before testified. No one of my assistant assessors ever did any act in regard to said scrip-dividend. I made no change in the assessment after writing the paper I have spoken of as written March 3, 1870. I acted as commissioner with Mr. Orton and Mr. Smyth, and signed the report with them.

John M. Bailey, the defendant in the case, being called in his own behalf, and being duly sworn, testified:

I am the defendant, and reside in Albany. I was collector of internal revenue for the fourteenth collection-district of the State of New York from the first day of December, 1869, to the thirtieth of May, 1873. Ralph P. Lathrop was the assessor of internal revenue for that district during that time. I received from him at Albany, March 4, 1870, a paper which I think was an assessment or list against the New York Central Railroad in this case. I caused the company to be notified to pay the tax. Notices were issued to the company. The first notice is dated March 4, 1870.

The written notice, dated March 4, 1870, was offered in evidence by the defendant's counsel, and received and read, and reads as follows:

(17.)

Monthly notice.

List..... Div. 4.

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
14TH DISTRICT, STATE OF NEW YORK,
Albany, N. Y., March 4, 1870.

M. Treasurer New York Central Railroad, Albany, N. Y.:

The tax assessed against N. Y. C. R. R. for dividend, amounting to $1,152,800.00, is due and payable on or before the 14 day of March; and unless paid within that time it will become my duty to collect the same, with a penalty of five per centum additional and interest at one per centum per month.

J. M. BAILEY, *Collector.*

☞ Bring this notice with you.

81 The witness further testified as follows: I prepared the written notice dated March 15, 1870. Counsel for the defendant offered the same in evidence.

The notice was then read and received in evidence, and reads as follows:

(21.)

General demand for taxes.

.....List. 4 Div.

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
14 DISTRICT, STATE OF NEW YORK,
Albany, March 15th, 1870.

M. The New York Central Railroad Company, or The New York Central and Hudson River Railroad Company.

A tax under the excise laws of the United States, amounting to 1,152,800 dollars, being for tax on scrip-dividend, has been assessed against you, and transmitted to me by the assessor of this district. The same not having been paid within the time required by law, you became liable to pay five per centum additional upon the amount thereof, and interest at one per centum per month from the 14 day of March, 1870, and demand is hereby made upon you for the said tax, with the additional five per centum, and such interest as may accrue before payment. If not paid within ten days from the personal service or mailing hereof, it will become my duty to collect the same by distraint and sale of property. Payment may be made to me at my office, No. 59 State st., Albany.

Am't of tax	$1,152,800
Penalty	57,640
Total	$1,210,440

J. M. BAILEY, *Collector.*

☞ Bring this notice with you.

The witness further testified: I think the next notice was dated February 26, 1872. The counsel for the defendant offered the same in evidence.

82 The notice was then received and read in evidence, and reads as follows:

UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 14TH DISTRICT, N. Y.,
Albany, Feb. 26, 1872.

To The New York Central Railroad Company, or The New York Central and Hudson River Railroad Company:

SIRS: I am in receipt of instructions from the Hon. Commissioner of Internal Revenue, stating that your company is liable to a tax of five per centum on the sum of $9,214,400.00, thus reducing the former assessment of March 3, 1870, on scrip-dividend, to the sum of $460,720.00, which amount I am directed to collect. Demand is hereby made upon you for the said tax of $460,720, and if not paid within ten days from the personal service hereof, a penalty of five per centum will be added.

Very respectfully,

J. M. BAILEY, *Collector.*

The witness further testified as follows:

There was another notice under date of March 15th, 1872. Counsel for the defendant offered such notice in evidence. The notice was then received and read in evidence, and reads as follows:

(21.)

General demand for taxes.

Spec. List.] [2 Div.

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE.
14 DISTRICT, STATE OF NEW YORK,
Albany, March 15th, 1872.

M. New York Central or New York Central & Hudson R. Rd. Co.

A tax, under the excise laws of the United States, amounting to four hundred and sixty thousand seven hundred and twenty dollars, being for tax on scrip-dividend, has been assessed against you, and transmitted to me by the assessor of this district. The same not having been paid within the time required by law, you became liable to pay five per centum additional upon the amount thereof, and interest at one per centum per month from the 15th day of March, 1872, and demand
83 is hereby made upon you for the said tax, with the additional five per centum, and such interest as may accrue before payment. If not paid within ten days from the personal service or mailing hereof, it will become my duty to collect the same by distraint and sale of property.

Payment may be made to me at 59 State st.

Amount of tax	$460,720
Penalty	23,036
Total	$483,756

J. M. BAILEY, *Collector.*

☞Bring this notice with you.

The witness further testified, as follows:

After the assessment was transmitted to me, and after the foregoing notices were issued by me, I issued to my deputy, H. J. Connell, who was then deputy collector under me, three warrants of distraint, each signed by me as collector, for the collection of the tax in question. The first warrant is dated March 8th, 1873; the second one is dated March 30th, 1873; and the third one is dated April 23d, 1873.

The said three warrants were then received and read in evidence.

The following are copies of said warrants:

(69.)

Warrant.

UNITED STATES OF AMERICA,
14TH COLLECTION-DISTRICT, STATE OF NEW YORK.

To H. J. CONNELL, *Deputy Collector:*

Whereas, in pursuance of the provisions of the acts of Congress of the United States to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes, the several persons and firms named in the list or schedule, signed by me, and hereto annexed, have become chargeable with, and are indebted to the United States, for the taxes assessed against them respectively, in the amount set forth opposite the name of each in the aforesaid list or schedule, to-

gether with the penalty as therewith stated, amounting, in the aggregate, to $460,720, for neglect to pay the said tax when the same became due; and whereas more than ten days have elapsed since payment of said taxes was demanded of each of said persons or firms, and as they still neglect and refuse to pay the same: You are hereby commanded to distrain upon so much of the goods, chattles, and effects of each of them respectively, if any such can be found, as may be necessary for the payment of the taxes and penalties due and owing by them respectively, as set forth in the aforesaid schedule; and also for the payment of all necessary and reasonable fees and expenses of each said distraint, with the commission chargeable by law; and you will safely keep all property so distrained, and do all things needful and necessary to be done in the premises, as required by law, before the sale thereof; but in case sufficient goods, chattels, and effects cannot be found, then you are hereby commanded to seize so much of the real estate of each of said persons or firms as may be necessary for the purposes aforesaid; and for so doing this shall be your warrant, of which make due service and return to me at this office.

84

Witness my hand and official seal, at Albany, N. Y., this 8th day of March, anno Domini 1873.

J. M. BAILEY,
Collector of Internal Revenue, 14th District of New York.

SCHEDULE.

Name.	Location.	Description of tax.	Amount of tax.	Penalty.	Total.	Remarks.
New York Central Railroad Company or The New York Central and Hudson River Railroad Company.	Albany, N. Y.	Scrip-dividend.	$460,720 00			

(69.)

Warrant.

UNITED STATES OF AMERICA,
14TH COLLECTION DISTRICT, STATE OF

To H. J. CONNELL, *Deputy Collector:*

Whereas, in pursuance of the provisions of the acts of Congress of the United States to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes, the several persons and firms named in the list or schedule signed by me, and hereto annexed, have become chargeable with and are indebted to the United States for the taxes assessed against them, respectively, in the amount set forth opposite the name of each in the aforesaid list or schedule, together with the penalty as therewith stated, amounting, in the aggregate, to 460,720 dollars, (see remarks,) for neglect to pay the said tax when the same became due; and whereas more than ten days have elapsed since payment of said taxes was demanded of each of said persons or firms, and as they still neglect and refuse to pay the same: You are hereby commanded to distrain upon so much of the goods, chattels, and effects of each of them, respectively, if any such can be found,

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as may be necessary for the payment of the taxes and penalties due and owing by them, respectively, as set forth in the aforesaid schedule, and also for the payment of all necessary and reasonable fees and expenses of each said distraint, with the commission chargeable by, law. And you will safely keep all property so distrained, and do all things needful and necessary to be done in the premises, as required by law, before the sale thereof; but in case sufficient goods, chattels, and effects cannot be found, then you are hereby commanded to seize so much of the real estate of each of said persons or firms as may be necessary for the purpose aforesaid; and for so doing this shall be your warrant, of which make due service and return to me at this office.

Witness my hand and official seal, at Albany, N. Y., this 30th day of March, anno Domini 1873.

J. M. BAILEY,
Collector of Internal Revenue, 14th District of New York.

SCHEDULE.

Name.	Location.	Description of tax.	Amount of tax.	Penalty.	Total.	Remarks.
The New York Central Railroad Company, or The New York Central & Hudson River Railroad Company.	Albany, N. Y.	Scrip-dividend.	$460,720 00			Less amount received from sale of March 22d, 1873.

86 (69.)

Warrant.

UNITED STATES OF AMERICA,
14th Collection District, State of New York:

To H. J. CONNELL, *Deputy Collector:*

Whereas, in pursuance of the provisions of the acts of Congress of the United States to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes, the several persons and firms named in the list or schedule signed by me and hereto annexed have become chargeable with, and are indebted to the United States for, the taxes assessed against them, respectively, in the amount set forth opposite the name of each in the aforesaid list or schedule, together with the penalty as therewith stated, amounting in the aggregate to $460,720.00, less amount received from former sales, for neglect to pay the said tax when the same became due; and whereas more than ten days have elapsed since payment of said taxes was demanded of each of said persons or firms, and as they still neglect and refuse to pay the same: You are hereby commanded to distrain upon so much of the goods, chattels, and effects of each of them, respectively, if any such can be found, as may be necessary for the payment of the taxes and penalties due and owing by them, respectively, as set forth in the aforesaid schedule, and also for the payment of all necessary and reasonable fees and expenses of each said distraint, with the commission chargeable by law; and you will safely keep all property so distrained, and do all things needful and necessary to be done in the premises, as required by law, before the sale thereof; but in case sufficient goods, chattels, and effects

cannot be found, then you are hereby commanded to seize so much of the real estate of each of said persons or firms as may be necessary for the purposes aforesaid; and for so doing this shall be your warrant, of which make due service and return to me at this office.

Witness my hand and official seal, at Albany, N. Y., this 23rd day of April, anno Domini 1873.

J. M. BAILEY,

[L. S.] *Collector of Internal Revenue, 14th District of New York.*

87 SCHEDULE.

Name.	Location.	Description of tax.	Amount of tax.	alty.	Total.	Remarks.
New York Central & Hudson River Railway Company.	Albany, N. Y.	Scrip-dividend.	$460,720 00			Less amount received from sale of property formerly distrained.

COLLECTOR'S OFFICE, 14TH DISTRICT, NEW YORK,
Albany, April 23rd, 1873.

Whereas distraint has this twenty-third day of April, 1873, been made against the following property, situate in the old and new round-houses and in paint and erecting shops of the New York Central and Hudson River Railroad Company, at West Albany, New York:

Locomotive and tender No. 379; shop-number, 846.
Locomotive and tender No. 9; shop-number, 54.
Locomotive and tender No. 191; shop-number, .
Locomotive and tender No. 226; shop-number, .
Locomotive and tender No. 262; shop-number, 397.
Locomotive and tender No. 292; shop-number, 44.
Locomotive and tender No. 340; shop-number, 749.
Locomotive and tender No. 314; shop-number, 65.
Locomotive and tender No. 371; shop-number, .
Locomotive and tender No. 88; shop-number, 15.
Locomotive and tender No. 212; shop-number, .
Locomotive and tender No. 229; shop-number, 38.
Locomotive and tender No. 261; shop-number, 396.
Locomotive and tender No. 14; shop-number, 68.
Locomotive and tender No. 274; shop-number, 409.
Locomotive and tender No. 285; shop-number, 39.
Locomotive and tender No. 263; shop-number, 398.
Locomotive and tender No. 352; shop-number, 819.
Locomotive and tender No. 38; shop-number, .
Locomotive and tender No. 271; shop-number, 402.
Locomotive and tender No. 13; shop-number, 50.
Locomotive and tender No. 269; shop-number, 28.
Locomotive and tender No. 284; shop-number, 37.
Passenger-coach No. 265.
Passenger-coach No. 249.
88 Passenger-coach No. 250.
Passenger-coach No. 63.
Passenger-coach No. 175.
Passenger coach No. 186.
Passenger-coach marked "A."
Passenger-coach marked "B."

Passenger-coach marked "C."
Passenger-coach marked "D."
Passenger-coach marked "E."
Passenger-coach marked "F."
Passenger-coach marked "G."
Passenger-coach marked "H."
Passenger-coach No. 143.
Passenger-coach marked "K."
Passenger-coach No. 165.
Passenger-coach No. 135.
Passenger-coach No. 194.
Passenger-coach No. 13.
Passenger-coach No. 212.
Passenger-coach No. 62.
Passenger-coach No. 83.
Passenger-coach No. 241.
Passenger-coach No. 40.
Passenger-coach No. 160.
Passenger-coach No. 11.
Passenger-coach marked "A^2."
Passenger-coach No. 137.
Passenger-coach No. 280.
Passenger-coach marked "A^3."
Passenger-coach marked "A^4."
Passenger-coach No. 259.
Passenger-coach No. 101.
Passenger-coach No. 285.
Passenger-coach No. 113.
Baggage-car No. 76.
Baggage-car No. 69.
Baggage-car marked "A^1."

From the New York Central Railroad Company, or from the New York Central and Hudson River Railroad Company, for non-payment of taxes due and owing to the United States.

Notice is hereby given, in pursuance of the provisions of the act of Congress entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, and the several acts amendatory thereof, that I will expose for sale at public auction the above-mentioned property, at the several places where the same are located, at West Albany, New York, on the fifth day of May, 1873, at twelve o'clock at noon.

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JOHN M. BAILEY,
Collector 14th District, New York.

By H. J. CONNELL,
Deputy Collector.

The witness further testified:

The money, when collected by me in this case, was deposited to the credit of the Secretary of the United States, except my fees and expenses, prior to the commencement of this action. This action was commenced May 23, 1873.

On being cross-examined, the witness testified as follows:

Cross-examined by Mr. Conkling:

Q. When did the assessor first deliver you any paper touching that scrip-dividend?

A. I think it was on the fourth of March, 1870.
Q. Can you remember the time of day?
A. I cannot, sir.
Q. Your office and his were in the same building?
A. Yes, sir.
Q. What paper was it that he then delivered to you?
A. This list.
Q. That? [Indicating.]
A. I think that is it. Yes, sir.
Q. Did he ever deliver to you any other paper?
A. I do not know whether he did or not.
Q. I can get only your knowledge. Did he ever deliver to you any other paper on that subject, that you know of?
A. He may have, but I do not remember it now.
Q. Well, then, he did not deliver you any other paper, that you know of?
A. Not that I can recollect.
90 Q. This paper you denominate an alphabetical list?
The COURT. One moment. That alphabetical list has not been read in evidence.
Mr. CONKLING. I am aware of it, your honor. I have it here in my hand; I meant to call your attention to it.
The COURT. I knew it had not been numbered.
Mr. CONKLING. Mr. Crowley, do you want to put that in evidence, or not?
Mr. CROWLEY. I will judge of that hereafter.
The COURT. I thought it might be more convenient, for the purpose of cross-examination, to refer to it as an exhibit.
Mr. CONKLING. My friend's judgment will doubtless become matured before the time comes to make it necessary. However, I will assume, as I cannot know whether it is evidence or not, that it is a paper produced by the witness, and I will ask him a question or two about it.
(To the witness.) Q. This is an alphabetical list, so called, is it?
A. Yes, sir.
Q. It is the only list of that sort relating to this matter that you know of?
A. Well, no, sir; I think it was put into the list in the regular—it was a special list.
Q. Let me understand that, if you please. Is there a general and also a special list known to the revenue law?
A. Yes, sir.
Q. What is this, a general or a special list?
A. I think that was a special list.
Q. Can you not tell from looking at it?
A. No, sir.
91 Q. When you look at this, can you not tell whether it is what you understand by a special list or a general list?
A. Yes, sir.
Q. Do you mean this list here?
A. Certainly.
Q. Won't you look at that, and tell me whether that is what you understand to be a a special list or a general list?
A. (Examining.) This is a general list.
Q. Is this the only general list ever delivered to you by the assessor, relating to the scrip-dividend, so called?
A. I do not know, sir, whether it is or not.

Q. Do you know of any other general list on which that so-called dividend appears?

A. I do not know whether there is or not?

Q. You do not know whether there is or not?

A. No, sir.

Q. Then you might answer my question that you do not know that there is?

A. I do not know that there is.

Q. Did you act upon this list?

A. Yes, sir.

Q. This was the foundation of your action?

A. I think so.

Q. Have you any doubt about it?

A. I might explain here, if you will allow me, that I am not in possession now of the records of my office, and I am not able to tell whether that was all the list or not. I think that is the list, although that has not been in my possession. I could not say positively.

Q. Assuming that this is the list, and, of course, I do not know, but I take it for granted that there is no imposition being practiced about this——

92 Mr. CROWLEY. One word, if you please. (To witness.) That was a list that you sent to me at the time this suit was commenced, and has been in my possession ever since?

The WITNESS. Then I suppose it is a copy of the list.

Mr. CONKLING. You suppose it is a copy?

A. If that is the fact.

Mr. CONKLING. I will have to hand this to you again. Will you look at it carefully, and see whether that is an original list; and if so, what; or whether it is a copy of any; and if so, what? I would like to have some one thing certain in this case.

A. (Examining.) I cannot tell, sir.

Q. Did you ever see that paper before?

A. Yes, sir; I will swear I have seen it before.

Q. When will you swear you have seen it?

A. I do not know, sir.

Q. Can you mention any year in which you have seen it?

A. No, sir.

Q. Will you say it was ever delivered to you by the assessor?

A. I will not.

Q. You cannot tell anything about it?

A. I can tell something about. I see some of my writing upon it.

Q. You do see some of your writing upon it?

A. Yes, sir.

Q. Won't you point out to me that writing?

A. (Indicating.) That is my writing there.

Q. Any other?

A. No, sir.

Q. Whose writing is that? (Indicating.)

93 A. I don't know, sir. I think it is the writing of Mr. Connell, former deputy collector. It looks like his. I think it is.

Q. Did you send that paper to Mr. Crowley?

A. I do not know whether I did or not.

Q. Did you send any paper to Mr. Crowley?

A. I have sent him papers.

Q. Did you send any papers purporting to be a list containing that scrip-dividend, so called?

A. I have no distinct recollection now whether I did or not; I might have done so.

Q. Had you any hesitation, when you were first called, in producing this paper as the paper that was delivered to you?

A. I did not produce it, sir.

Q. Was it not handed to you, and did not you testify from it?

A. He asked me if that was the list, and I thought it was, or a copy of it.

Q. Did you not testify, "I received this paper from Mr. Lathrop on the 4th of March, 1870; it is an assessment?"

A. I might have done so.

Q. Did you not further testify, "This is the original alphabetical list for the 14th district?"

A. I may have done so.

Q. You may have done so?

A. Yes, sir.

Q. My inquiry more especially was, did you not do so?

A. I do not know whether I did or not.

Q. Will you say now whether this is the list that you had or not?

A. I do not know.

Q. You will not say one way or the other?

94 A. I think, from looking at the writing now, that it is a copy, but the original is not in my possession.

Q. Do you think it is a true or a false copy?

A. I do not know. I do not think it is a false copy.

Q. Then you do think it is a true copy?

A. I think so; yes, sir.

Q. Have you any doubt about that?

A. No, sir.

Q. You are willing to put yourself upon that?

A. I have not compared it, and do not know. I presume it to be a true copy.

Q. Assuming it to be a true copy, do you know of any other list touching that so-called dividend?

A. No, sir.

Q. And this, you say, is a general list in its character?

A. Yes, sir.

Q. What do you say?

A. That purports to be a copy—yes, sir. This is a general list in its character.

Q. What did you do with the list after receiving it, if you did receive it, from Mr. Lathrop?

A. It was put on file in the office.

Q. In your office?

A. Yes, sir.

Q. What else was done with it?

A. Not anything else that I know of.

Q. I see a note on here: "Returned to assessor, April 23d, 1870." Do you know what that means?

A. I think it means that it was returned to the assessor.

Q. You think it does mean so?

A. Yes, sir.

Q. Well, that is what it says: "Returned to assessor, April 23d, 1870." Do you recollect anything about that?

95 A. I do not now, sir.

Q. Did you sign these warrants?

A. Yes, sir.
Q. Who made them out?
A. I do not remember whether I made them out or my deputy.
Q. Have you looked at them to see that you signed them all?
A. I remember—no, sir.
Q. Look; that is the quickest way. See whether they are signed by you.
A. That is signed by me, (indicating.) That is signed by me, (indicating.) Yes, sir; they are all three signed by me.
Q. Did you act on this list, which Mr. Lathrop delivered to you, in issuing these warrants?
A. Yes, sir.
Q. Did you act on anything else?
A. No, sir—well, yes. I acted on the instructions of the Commissioner of Internal Revenue.
Q. You did act on the instructions of the Commissioner of Internal Revenue?
A. Yes, sir.
Q. Where are these instructions?
A. I suppose they are on file in the office.
Q. The instructions were addressed to whom?
A. Addressed to me.
Q. But they are not here?
A. No, sir.
Q. Why did you not bring them?
A. I am not in possession of the records of the office, sir.
Q. Then you acted upon nothing except that assessment, which came to you from the assessor. So far I am right?
96 A. I acted on no other assessment; no, sir.
Q. And upon no other papers that had come to you from the assessor, for if there is any other papers, now is the time we want to know it?
A. I do not say but what there was; and if there was, I probably acted upon it. That I do not remember.
Q. Let us see if we can get at it in this way: Did you act upon anything that you can now state, except the assessment which lies here?
A. No, sir.
Q. And you know nothing else upon which you could have acted?
A. No; with the exception of the instructions.
Q. I am speaking now of the assessor; no other matter which proceeds from the assessor?
A. No sir.
Q. Did you ever take any proceedings yourself in regard to that assessment?
A. Yes, sir.
Q. When?
A. In regard to the assessment, do you mean?
Q. I said so.
A. Proceedings in reference to the assessment? No, sir; I had nothing to do with the assessment.
Q. So I suppose; but you said you had.
A. I misapprehended your question.
Q. I will repeat the question. Did you ever do anything yourself touching the assessment of that scrip-dividend, so called?
A. No, sir.

Q. Did you ever do anything touching any hearing or appeal, or anything in regard to it; did you ever participate in it in any way?

A. No, sir. Well, I might, except by receiving communica-
97 tions, and sending communications from the officers of the company to Washington in regard to it. There was some correspondence.

Q. You mean transmitting correspondence?

A. Yes, sir.

Q. Of course, I did not inquire about that; I spoke of what you did as collector, any official act?

A. That was all official.

Q. In a general sense they may have been, but I do not speak of your sending a letter one way or the other. I want to know whether you ever did anything touching the assessment itself, or any appeal or investigation, or hearing of any kind, before you were collector?

A. No, sir.

WILLIAM H. LIVINGSTON, then being called as a witness on the part of the defence, and being duly sworn and examined, testified:

I reside in Albany, and did in March, 1870. I was at that time a deputy collector of internal revenue under the defendant, John M. Bailey, at Albany. About the 4th day of March, 1870, I served upon Charles Wendell, in the treasurer's office of the New York Central Railroad Company, at Albany, a demand-notice. It is my impression that I served other notices, but I have not sufficient recollection to state whether I did or not. I knew of Mr. Wendell being connected with the New York Central Railroad Company at Albany.

HUGH J. CONNELL, then being called as a witness on the part of the defence, and being duly sworn and examined, testified:

I reside in Albany. I was deputy collector of internal revenue for the fourteenth collection-district of New York under the defendant, John M. Bailey, from December 20th, 1869, to the 20th of May, 1873. I served demand-notices for the collection of the tax upon what is
98 known as the New York Central scrip-dividend. I served the first notice upon the 26th day of February, 1872, upon Mr. Worcester, who was the secretary of the New York Central and Hudson River Railroad Company. I served Form 21 on him. On the 15th day of March, 1872, I served another notice, dated that day, and which is the notice of that date put in evidence in this case on Mr. Worcester. It was on Form 21. The defendant, as collector, issued to me three warrants, and I made three distraints thereunder upon the property of the New York Central Railroad Company, or upon the property of the New York Central and Hudson River Railroad Company. On the 8th day of March, 1873, at the city of Albany, I served upon E. D. Worcester, by leaving with his wife, Mrs. Worcester, he being then out of the city, a notice or account of distraint of the goods and chattels seized under the warrant dated March 8th, 1873, of which the following is a copy:

To the New York Central Railroad Company or The New York Central and Hudson River Railroad Company:

The following is an account of the goods and chattels owned or possessed by you which have, this eighth day of March, 1873, been distrained by the collector of the fourteenth collection-district of the State of New York, for the non-payment of the duties or taxes due and owing by you to the United States, in pursuance of the provisions of an act entitled "An act to provide internal revenue to support the Govern-

ment, to pay interest on the public debt, and for other purposes," approved June 30, 1864, and of acts amendatory thereof and acts subsequently passed:

Locomotive and tender, No. 95, shop No., 55, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 17, shop No., 48, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 280, shop No., 33, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 315, shop No., 66, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 288, shop No., 40, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 346, shop No., —. situate in new roundhouse at West Albany, N. Y.

99 Locomotive and tender, No. 277, shop No., 33, situate in new round-house at West Albany, N. Y.

Locomotive and tender, No. 290, shop No., 42, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 19, shop No., 47, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 312, shop No., 63, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 313, shop No., 64, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 265, shop No., 400, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 8, shop No.,—, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 273, shop No., 408, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 380, shop No., 847, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 382, shop No., 849, situate in new roundhouse at West Albany, N. Y.

Locomotive and tender, No. 310, shop No., 61, situate in new roundhouse at West Albany, N. Y.

The sum demanded of you is four hundred and sixty thousand seven hundred and twenty dollars, ($460,720.00,) together with the expenses, and the goods and chattels distrained for the non-payment of the same will be sold at public auction at the U. S. collector's office, No. 59 State street, in the city of Albany, N. Y., on the twenty-second day of March, 1873, at twelve o'clock at noon.

Dated Albany, N. Y., March 8th, 1873.

JOHN M. BAILEY,
Collector 14th District of New York.
By H. J. CONNELL,
Deputy Collector.

It is indorsed as follows:

To E. D. Worcester, esq., ex-treasurer of the New York Central Railroad Company, and secretary of the New York Central and Hudson River Railroad Company. Copy served on E. D. Worcester, esq., through Mary L. Worcester, wife of above, by

H. J. CONNELL,
Deputy Collector.

ALBANY, *March* 8, 1873.

On the 12th day of April, 1873, another notice or account of distraint under the warrant dated March 30th, 1873, was served by me,
100 by leaving the same with Warren S. Low, jr., at the office of the secretary of the plaintiff, at Albany, N. Y. Mr. Low was a clerk in that office. The following is a copy of such notice or account of distraint.

To New York Central Railroad Company or to The New York Central and Hudson River Railroad Company.

The following is an account of the goods and chattels owned or possessed by you which have, this thirty-first day of March, 1873, been distrained by the collector of the fourteenth collection-district of the State of New York, for the non-payment of the duties or taxes due and owing by you to the United States, in pursuance of the provisions of an act entitled, "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, and of acts amendatory thereof, and acts subsequently passed:

Locomotive and tender 94, shop No., —.
Locomotive and tender 370, " " —.
Locomotive and tender 105, " " 387, S. L. W.
Locomotive and tender 71, " " —.
Locomotive and tender 183, " " —.
Locomotive and tender 24, " " 59.
Locomotive and tender 2, " " —.
Locomotive 16 and tender 8, " " —.

The sum demanded of you is four hundred and sixty thousand seven hundred and twenty ,($460,720.00,) less amount received from previous sale, *dollars*, together with the expenses, and the goods and chattels distrained for the non-payment of the same will be sold at public auction, at said round-house, between Montgomery and Water streets, in the city of Albany, N. Y., on the twelfth day of April, 1873, at twelve o'clock at noon.

J. M. BAILEY,
Collector 14th District of New York,
By H. J. CONNELL,
Deputy Collector.

It is indorsed as follows:

One copy mailed to Co. M'ch 31, and one copy served on W. S. Low, jr., clerk for N. Y C. & H. R. R. R. Co.

It was admitted upon said trial, by and between the counsel for the respective parties, that Exhibit A, set forth in the declaration in
101 this action, is a correct copy of the preamble, form of interest-certificate, and assignment thereof, issued by the New York Central Railroad Company on the 19th day of December, 1868, and is in the words and figures following, to wit:

A.

THE NEW YORK CENTRAL RAILROAD COMPANY.

Whereas this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of

real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent. of the capital stock of the company; and whereas the several stockholders of the company are entitled to evidence of such expenditure, and to re-imbursement of the same at some convenient future period:

Now, therefore, resolved, That a certificate, signed by the president and treasurer of this company, be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per cent. of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on the shares of the capital stock of the company; and that such certificates may be, at the option of the company, convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

Resolved, That such certificates be delivered to the stockholders of this company at the Union Trust Company, in the city of New York, on the presentation of their several certificates of stock, and that the receipt of the certificate provided for in these resolutions shall be endorsed on the stock certificate.

THE NEW YORK CENTRAL RAILROAD COMPANY.

No. —.] [Interest-certificate.

Under a resolution of the board of directors of this company, passed December 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that , being the holder of shares of the capital stock of said company, is entitled to dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

102 This certificate may be transferred on the books of the company on the surrender of this certificate.

In witness whereof the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868.

President.

Treasurer.

For a valuable consideration, do hereby sell, assign, and transfer all interest in the above certificate to and do hereby irrevocably appoint attorney to execute a transfer thereof on the books of the railroad company therein mentioned.

E. D. WORCESTER, a witness called on the behalf of the defendant, and being duly sworn and examined, testified:

I reside in the city of Albany, and am the secretary of the New York Central and Hudson River Railroad Company. I was a stockholder in the New York Central Railroad Company December 19, 1868. The capital stock of the New York Central Railroad Company on that day was $28,795,000.00, and was all issued. The amount of the interest-certificates was $23,036,000. Twenty-two millions have been issued, and possibly twenty-two and a half millions. There are some not issued yet; have never been called for.

Said witness, Worcester, on his cross-examination, testified: The capital stock of the New York Central Railroad Company had all been issued before December 19, 1868, and no more stock remained to be issued when the interest-certificates of December 19, 1868, were issued. The New York Central Railroad Company had not on hand, on the 19th of December, 1868, any earnings, profits, income, gains, or monies on which said certificates were based or with which they would be paid.

103 The counsel for the defendant then offered in evidence chapter 918 of the laws of the State of New York, passed May 20th, 1869. It was received and read in evidence, and reads as follows:

CHAP. 918.

An act authorizing the increase of the stock of the New York Central Railroad Company, passed May 20, 1869.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The New York Central Railroad Company is hereby authorized, with the concurrence of two-thirds in amount of all its stockholders, procured in the mode provided for by section nine of the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, to increase its capital stock to the amount of eighty per cent. of its present capital.

§ 2. The increase of capital stock authorized by the first section of this act shall be used only in exchanging the same for the interest-certificates of said company, authorized at their meeting held December nineteenth, eighteen hundred and sixty-eight.

§ 3. This act shall take effect immediately.

The counsel for the defendant admitted on said trial the truth of the following allegations of the declaration in this case, viz: "The plaintiff, further complaining, says that a dividend of $921,440 upon the said interest-certificates was declared payable February 20th, 1869, and the United State internal-revenue tax thereon, amounting to $46,072, was assessed and paid to the United States collector for said collection-district on the 27th day of July, 1869, and that another dividend of $921,440 upon said interest-certificates was declared payable August 20th, 1869, and the United States internal-revenue tax thereon, amounting to $46,092, was assessed and paid to said collector on the 27th day of January, 1870. The plaintiff, further complaining, says that the New
104 York Central Railroad Company declared two dividends of $1,151,800 each upon its capital stock, payable respectively on the 20th day of February, 1869, and the 20th of August, 1869, and duly returned the same to the United States assessor for said collection-district, who assessed a tax against said company of $57,590 upon each of said dividends, which tax was paid by said company to said collector."

It was admitted upon said trial by the counsel for the respective parties that the New York Central Railroad Company was a railroad company existing within and under the laws of the State of New York from May, 1853, to November 1st, 1869, operating its road from the city of Albany to Buffalo and Niagara Falls.

The counsel for the defendant then offered in evidence copies of the

annual reports of the New York Central Railroad Company to the State engineer and surveyor of the State of New York for the years ending September 30, 1862, September 30, 1863, September 30, 1864, September 30, 1865, September 30, 1866, September 30, 1867, September 30, 1868, and September 30, 1869. Also copies of the annual reports of the New York Central and Hudson River Railroad Company, the plaintiff in this action, to the State engineer and surveyor of the State of New York, for the years ending September 30, 1870, September 30, 1871, September 30, 1872, and September 30, 1873. Each of the foregoing copies being duly certified by the State engineer and surveyor of the State of New York, and the governor of the State of New York, under the great seal of the State, as required by the statutes of the State of New York and the statutes of the United States.

The reports were then considered as read in evidence, but were not then read.

The defendant here rested his case, and thereupon the counsel
105 for the plaintiff requested the court to hold according to the following propositions, severally and separately:

1st. The assessor had no authority in the premises save that given by the internal-revenue laws of Congress, and at the time of the so-called assessment, March 3d, 1870, no action was warrantable by the assessor unless the New York Central Railroad Company was in default under said internal-revenue laws. There must have been a time certain when the corporation was bound to make a list or return of a "scrip-dividend" of $23,036,000, which it neglected to make, or made falsely. This default must be shown as a jurisdictional fact, and as a condition precedent to any action whatever by the assessor or other officer of the revenue.

2d. Assuming that default had been made, the assessment and action by the assessor were illegal and void, because not in accordance with the statute, but in violation of it. If default or omission had occurred, the statute points out the way, and the only way, in which the assessor might proceed. The alleged delinquent must be summoned or have notice, and given a hearing with a view to "the ascertainment of the liability to tax;" an inquiry must be made into the facts, and the assessor must view, consider, and determine. Time and opportunity for appeal to the assessor must be permitted, and this quasi-judicial examination is secured during the whole 15 months within which the tax claimed may be pursued by assessment.

3d. The pretended assessment was against the New York Central Railroad Company, and against nobody else. This corporation had ceased to exist more than four months before. On the 1st day of November, 1869, the New York Central Railroad Company became extinct
in law and in fact. It could not afterwards sue or be sued. It
106 could not speak or act, and an assessment against it was in all legal intents an assessment against a dead person. No lien could be created or legal effect be produced by such an assessment. If, in its life-time, the corporation owed a tax, this debt, as a "liability," survived, and attached to the new corporation, the New York Central and Hudson River Railroad Company. The statute of New York of May 20th, 1869, preserved it as a "liability," and section 41 of the act of Congress of June 30th, 1864, as amended in 1866, gives the United States a full and clear remedy in a proper form of action before any circuit or district court of the United States.

4th. The seizure was of the property of the plaintiff on an assessment against another person, and that person dead long before the assessment

was made. It is the case of seizing the goods of one man on an execution against another, which execution was void as to everybody.

5th. If the defendant or the United States, by the so-called assessment, acquired a lien upon the property of the New York Central Railroad Company, even then the seizure complained of would be illegal and void. A lien is specific, and binds only the property to which it attaches at first. It does not grow and spread over other property, particularly the property of third persons. And had the defendant possessed a lien fixed on the 3d day of March, 1870, he must, of course, taken the very property on which it had fastened. If this property was the whole property of the New York Central Railroad Company, still, the lien was confined to that property. And when, three years afterwards, the defendant seized indiscriminately the property of the plaintiff, and threatened to continue to seize until he arrested its business, the act was a trespass without regard to the question whether there was or was not a
107 lien upon such property as had belonged to the New Central Railroad Company.

The court refused to hold according to either of said propositions.

The counsel for the defendant then read from said reports of the New Central Railroad for the years ending September 30th, 1862, and September 30th, 1868, as follows:

Capital stock, per report, for the year 1862	$24,000,000 00
Capital stock, per report, for the year 1868	$28,780,000 00
Cost of road and equipment, per report of 1862	$31,787,397 80
Cost of road and equipment, per report of 1868	$36,607,696 87
Amount of funded debt, per report of 1862	$14,279,593 34
Amount of funded debt, per report of 1868	$11,458,904 11
Length of double track, including siding, per report of 1862	$379\frac{4}{100}$ miles.
Length of double track, including sidings, per report of 1868	$459\frac{5}{100}$ miles.
Length of branches owned by company, laid per report of 1862	$258\frac{13}{100}$ miles.
Length of branches owned by company, laid per report of 1868	296 miles.
Number of locomotive-engines, per report of 1862	229
Number of locomotive-engines, per report of 1868	292
Number of first-class passenger-cars, rated as eight-wheel cars, per report of 1862	196
Number of first-class passenger-cars, rated as eight-wheel cars, per report of 1868	205
Number of second-class and emigrant cars, rated as eight-wheel cars, per report of 1862	35
Number of second-class and emigrant cars, rated as eight-wheel cars, per report of 1868	92
Number of baggage, mail, and express cars, rated as eight-wheel cars, per report of 1862	63
Number of baggage, mail, and express cars, rated as eight-wheel cars, per report of 1868	95
Number of freight-cars, as follows: Wooden box, rated as eight-wheel cars, per report of 1862	2,404
Iron box, rated as 8-wheel cars	121
Platform, rated as 8-wheel cars	717
	3,242
Number of gravel-cars and other service-cars, per same report	350
Number of freight-cars, rated as eight-wheel cars, per report of 1868	5,118

108 *Earnings, receipts, and payments per report of* 1862.

EARNINGS AND RECEIPTS.

From passengers	$2,389,724 12
From freight	6,607,330 96
From other sources	359,772 69
Total	$9,356,827 77

Payments other than for construction.

For transportation expenses, viz:

For passenger-business	$1,485,616 63	
For freight-business	4,122,133 40	
		$5,607,750 33
For interest, including interest on debt-certificates held for the sinking-fund	$1,021,193 12	
For sinking-funds	113,967 75	
For rent of Niagara Bridge and Canandaigua Railroad	60,000 00	
		$1,195,160 87
For dividends, viz:		
No. 17, Feb., 1862, 3 per cent	$720,000 00	
No. 18, Aug., 1862, 3 per cent	720,000 00	
		$1,440,000 00

Transportation-expenses for the year ending September 30, 1862, 59.93 per cent. of the gross earnings for the same period.

Net earnings for the year ending September 30, 1872... $2,553,916 57

The counsel for the defendant then read from said report for the year 1863, as follows:

Earnings, receipts, and payments, per report of 1863.

EARNINGS & RECEIPTS.

From passengers	$2,930,341 37
From freight	7,498,508 95
From other sources	468,781 06
Total	$10,897,631 38

Payments other than for construction.

For transportation-expenses, viz:

For passenger-business	$1,983,157 12	
For freight-business	4,859,475 79	
109		$6,842,632 91
For interest, including interest on debt certificates held for the sinking-fund	$998,140 49	
For sinking-funds	112,060 02	
For rent of Niagara Bridge and Canandaigua Railroad	60,000 00	
		1,170,200 51

For dividends viz:

No. 19, Feb., 1863, 3½ per cent	$840,000 00	
No. 20, Aug., 1863, 3½ per cent	840,000 00	
U. S. tax on same, 3 per cent	50,400 00	
		$1,730,400 00

Transportation-expenses for the year ending September, 1863, 62.79 per cent. of the gross earnings for the same period.

Net earnings for the year ending September 30th, 1863, $2,884,797.96, equal to 11.92 per cent. on the amount of the capital stock of the company.

The counsel for the defendant then read from said report for the year 1864, as follows:

Earnings, receipts, and payments, per report of 1864.

EARNINGS AND RECEIPTS.

From passengers	$3,923,151 80
From freight	8,543,370 55
From other sources	531,367 48
Total	$12,997,889 83

Payments other than for construction.

For transportation-expenses, viz:

For passenger-business	$3,060,234 51	
For freight-business	6,285,949 85	
		$9,346,184 36
For interest, including interest on debt-certificates held for the sinking-fund	$1,026,765 38	
For sinking-funds	111,182 38	
For rent of Niagara Bridge and Canandaigua Railroad	60,000 00	
For U. S. tax on earnings	84,959 88	
		$1,282,907 60

For July, August, and September, 1864, previously the tax
110 was imposed on passengers only, the earnings from which, for the rest of the fiscal year, are stated herein, at the net amount, after deducting the tax.

For dividends, viz:

No. 21. Feb., 1864, 5 pr ct	$1,218,450 00	
No. 22. Aug., 1864, 4 pr ct	975,400 00	
U. S. tax on same	85,323 50	
		$2,279,173 50

Transportation-expenses for the year ending September 30th, 1864, 71.91 per cent. of the gross earnings for the same period.

Net earnings for the year ending September 30th, 1864, $2,368,797.83, equal to 9.25 per cent. (and U. S. tax thereon) on the amount of the capital stock of the company.

The counsel for the defendant then read, from said report for the year 1865, as follows:

Earnings, receipts and payments, per report of 1865.

1ST—EARNINGS AND RECEIPTS.

From passengers	$4,521,454 10
From freight	8,776,027 53
From other sources	678,042 76
Total	$13,975,524 39

2ND—PAYMENTS OTHER THAN FOR CONSTRUCTION.

For transportation-expenses, viz:		
For passenger-business	$4,185,524 60	
For freight-business	6,696,833 49	
		$10,882,358 09
For interest, including interest on debt-certificates held for the sinking-fund	$974,169 26	
For sinking-funds	111,182 38	
For rent of Niagara Bridge and Canandaigua Railroads	60,000 00	
For U. S. tax on earnings	338,451 85	
		$1,483,803 49
For dividends, viz:		
No. 23. Feb., 1865, 3 pr ct	$731,730 00	
No. 24. Aug., 1865, 3 pr ct	737,730 00	
U. S. tax on same	73,473 00	
		$1,542,933 00

Transportation-expenses for the year ending September 30th, 1865, 77.87 per cent. of the gross earnings for the same period. Net earnings for the year ending September 30th, 1865, $1,609,362.81, equal to 6.24 per cent. (and U. S. tax thereon) on the amount of the capital stock of the company.

111 The counsel for the defendant then read, from said report for the year 1866, as follows:

Earnings, receipts and payments.

EARNINGS AND RECEIPTS.

From passengers	$4,360,248 57
From freight	9,671,919 66
From other sources	564,617 45
Total	$14,596,785 68

Payments other than for construction.

Transportation-expenses, viz:		
For passenger-business	$4,143,312 30	
For freight-business	6,870,128 94	
		$11,013,441 24
For interest, including interest on debt-certificates held for the sinking-fund	$1,041,995 85	
For sinking-funds	112,102 38	

For rent of Niagara Bridge and Canandaigua Railroad	60,000 00	
For U. S. tax on earnings	322,232 00	
		$1,544,330 23
On passenger-earnings for the entire year		109,006 21
On all other earnings to end of July, 1866		213 225 79
		322,232 00
For dividends, viz:		
No. 25. Feb., 1866, 3 per cent	$739,230 00	
No. 26. Aug., 1866, 3 per cent	739,230 00	
U. S. tax on same	73,923 00	
		$1,552,383 00

Transportation-expenses for the year ending September 30, 1866, 75.45 per cent. of the gross earnings for the same period.

Net earnings for the year ending September 30, 1866, $2,039,014.21, equal to 7.83 per cent. (and U. S. tax thereon) on the amount of the capital stock of the company.

The counsel for the defendant then read, from the report of 1867, as follows:

112 *Earnings, receipts, and payments.*

EARNINGS AND RECEIPTS.

From passengers	$4,032,023 39
From freight	9,151,750 42
From other sources	795,740 19
Total	$12,979,514 00

Payments other than for construction.

For transportation-expenses, viz:		
For passenger business	$3,783,490 68	
For freight-business	6,870,201 71	
		$10,652,692 39
For interest, including interest on debt-certificates, held for the sinking-fund	$943,880 66	
For sinking-funds	111,182 38	
For rent of Niagara Bridge and Canandaigua Railroad	60,000 00	
For rent of the Saratoga and Hudson River Railroad	56,666 66	
For U. S. tax on passenger-earnings	100,353 88	
		$1,271,083 58
For dividends, viz:		
No. 27. Feb., 1867, 3 per cent	$796,110 00	
No. 28. Aug., 1867, 3 per cent	856,110 00	
United States tax on same	82,611 09	
		1,734,831 00

Transportation-expenses for the year ending September 30, 1867, 76.20 per cent. of the gross earnings for the same period.

Net earnings for the year ending September 30, 1867, $2,054,738.03, equal to 7.07 per cent. (and U. S. tax thereon) on the amount of the capital stock of the company.

The counsel for the defendant then offered to read from said reports for the years 1863, 1864, 1865, 1866, and 1867, certain statements.

These reports are included in printed pamphlets filed in the office of the State engineer and surveyor, annexed to each of which is the following certificate:

STATE OF NEW YORK, OFFICE OF STATE
ENGINEER AND SURVEYOR,
Albany, 28th May, 1874.

I hereby certify that the annexed is a true copy of the original official annual report for the year ending September thirtieth (30,) one
113 thousand eight hundred and sixty-three, (1863,) of the New York Central Railroad Company, filed in this office by said company, and of the whole thereof.

S. H. SWEET,
State Engineer & Sur'r.

Each pamphlet, at its commencement, is verified as follows:

"New York Central."

STATE OF NEW YORK,
City and County of Albany, ss:

Erastus Corning, president of the New York Central Railroad Company, and Chauncey Vibbard, general superintendent of the operations of the said road, being severally sworn, each for himself deposes and says that the statements in the annexed report, signed by him at the end thereof, are true and correct, according to the best of his knowledge, information, and belief.

ERASTUS CORNING.
C. VIBBARD.

Subscribed and sworn to before me, this 19th day of December, 1863.
J. STERNBERGH,
Commissioner of Deeds.

After the part of the pamphlet containing the statements which were read in evidence, there follows the signatures of the president and treasurer of the corporation, with the following certificate:

OFFICE OF THE N. Y. CENTRAL R. R. CO.,
Albany, December 9th, 1863.

The undersigned have caused the foregoing statements to be prepared by the proper officers and agents of this company, from its books and records, and have examined them as far as was practicable, and believe them to be correct.

ERASTUS CORNING, *President.*
C. VIBBARD, *General Supt.*

After these signatures there are annexed to the statements printed sheets, entitled "Income-account," "Balance-sheet," and "Additional statements," which are not signed by any person.

In these printed sheets are statements tending to show that certain items which arose from the earnings of the co. were carried to the
114 transportation-account and invested in construction or the purchase of additional property, and are not specifically enumerated in what is claimed to be the reports proper, which was objected to by the counsel for the plaintiff on the grounds—

First. It is incompetent.

Second. It is not a part of the reports, as required by law.

Third. It is not, in fact, a part of the reports.

The court sustained the objections, and excluded the evidence, to which ruling and decision of the court the counsel for the defendant then and there duly *accepted*.

The counsel for said defendant then read, from said report for the year 1868, as follows:

Earnings and cash receipts and payments.

EARNINGS.

From passengers	$4,063,701 46
" freight	9,491,427 25
" other sources	826,084 67
Total	$14,381,303 38

The above stated without reference to the amount actually collected.

RECEIPTS.

From passengers	$4,063,791 46
" freight	9,491,427 25
Rents, interest, dividends on stock held in other railroad companies, use of engines and cars, work done at shops, telegraph, transportation of mails, and miscellaneous items	826,084 67
	$14,381,303 38

Payments other than for construction.

For transportation-expenses	$9,238,162 87
For interest	857,802 68
" dividends on stock, amount and rate per cent., [one of three per cent., one of four per cent.]	2,110,248 00
Rents	60,000 00
U. S. tax on earnings	100,830 26
Sinking-fund	111,182 38
Total	$12,478,226 19

115 The counsel for the defendant offered to read from the report of the New York Central Railroad for the year 1869, and from the report of the plaintiff for the years 1870, 1871, and 1872, for the purpose of showing that the interest-certificates were merged in the capital stock of this plaintiff in the year 1872, and that dividends were declared and paid on such interest-certificates in 1869, 1870, and 1871, the same as upon the capital stock.

The counsel for the plaintiff objected to the introduction of said evidence, upon the ground that it was immaterial what was done with said interest-certificates after they were issued; that the question was, whether they were taxable by their character and the circumstances existing at the time they were issued, and that said evidence was incompetent and immaterial.

The court sustained the objection, and the counsel for the defendant excepted to such ruling.

The court further remarked that the reports of the New York Central Railroad Company, previous to 1869, were admitted in evidence, upon the statement of the counsel for the defendant that his object in offering them was to show what portion of the earnings referred to in said interest certificates had been realized since the internal-revenue law went into operation.

The defendant then rested and the evidence was then closed. The plaintiff's counsel then asked the court to instruct the jury according to the following propositions severally and respectively.

1st. The $1,000 penalty included in the assessment made by the assessor, Ralph P. Lathrop, on the 3d day of March, 1870, and testified to by him, rendered the whole assessment illegal and void.

2d. Assuming that by the issue of the interest-certificate
116 by the New York Central Railroad Company on the 19th day of December, 1868, any liability to tax was incurred under the laws of the United States, the only proper remedy for the collection of that tax after said company ceased to exist was by suit in the name of the United States, in a proper form of action in a circuit or district court of the United States.

3d. The New York Central Railroad Company having ceased to exist on the 1st day of November, 1869, the assessment afterwards made against it on the 3d of March, 1870, was void.

4th. It was not lawful by virtue of the alleged assessment against the New York Central Railroad Company, of which proof has been given, to seize the property of the plaintiff, which had never belonged to the New York Central Railroad Company.

5th. No valid assessment-roll or list has been proved as made by the assessor and delivered to the collector as required by law.

6th. No default by failing to make return or by making false return has been shown against the New York Central Railroad Company, such as authorized the assessor to make the so-called assessment, made March 3d, 1870, and of which proof has been given.

7th. The right of the assessor to assess was confined to 15 months after any alleged default, and no assessment could be made on the 3d of March, 1870, for any tax imposed by any act of Congress repealed in 1864.

8th. The certificates issued by vote of the directors of the New York Central Railroad Company, December 19th, 1868, were not taxable under the internal-revenue acts of the United States, except in respect of the interest or dividends paid thereon.

117 The court thereupon rendered its decision as follows:

Judge's decision.

The section of the internal-revenue law under which this tax was imposed requires "every railroad company that may have declared any dividend in scrip or money payable to its stockholders as part of the earning, profits, income, or gains of such company," to pay a tax of

"five per centum on the amount of such dividend whenever the same shall be payable." Another clause of the same section requires every railroad company to pay a tax of five per centum "on all profits, of such company, carried to the account of any fund, or used for construction."

In March, 1870, the assessor of the 14th collection-district of this State assessed the interest-certificates, issued by the New York Central Railroad Company on the 19th day of December, 1868, describing in his assessment the subject of the tax as a "scrip-dividend."

Subsequently a warrant of distraint was issued by the collector of said district against the property of the New York Central & Hudson River Railroad Company, directing the seizure and sale of the property of the last-named corporation for the satisfaction of such part of the said assessed tax as had not prior thereto been remitted by the Commissioner of Internal Revenue, and, upon the warrant levied upon the property of the last-named corporation, sold a portion of it, and thereupon the corporation, under protest, paid the sum remaining unsatisfied upon the warrant.

This action is brought to recover the sums received from the plaintiff under such levy, sale, and payment, and involves the question whether such tax was illegally or erroneously imposed by said assessor, or illegally collected by the collector.

118 Passing over certain other questions which have been raised in this case by the plaintiff, the serious questions in my view of the case to be decided are these:

1. Was the assessment valid against the New York Central Railroad Company, assuming it had declared a dividend in scrip within the meaning of the revenue act?

2. If the assessment was valid, did it justify the seizure and sale of the property of the New York Central & Hudson River Railroad Company?

3. Did the New York Central Railroad Company declare a dividend in scrip within the meaning of the section referred to?

The first and second of these questions can be most conveniently considered together.

It is insisted by the plaintiff that when, under the act of the legislature, the New York Central Railroad Company consolidated with the other corporation, thenceforth known as the New York Central & Hudson River Railroad Company, the first-named company passed out of being, and could not be assessed; and even if it could have been, such an assessment would not justify a levy upon the property of a new and distinct corporation. In my judgment, the peculiar provisions of the act of consolidation under which the New York Central Railroad Company united with the Hudson River Railroad Company, and were both thus constituted a single and new corporation, obviate the objections urged by the plaintiff. By that act it is provided that the "rights of all creditors of and all liens upon the property of either of said corporations shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence, to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if such debts and liabili-

119 ties had been incurred or contracted by it." A liability existed by the former corporation to pay this tax. It was a debt which the United States might have enforced by action. The former corporation, by the act, is deemed to continue in existence, to preserve the

rights and remedies of creditors unimpaired. Among these rights was that of the United States to enforce payment of the tax, if one was due. Its officers could have assessed it upon and collected it of the former corporation. The assessment, therefore, was valid. By the act the remedies for enforcing the liability are preserved, not only as against the property of the former corporation, but are extended so as to allow enforcement from the property of the new corporation to the same extent as though it was the debtor. By force of the statute, then, the assessment against the former corporation became in law an assessment against the new, and its property could be properly seized and sold to satisfy the liability.

My conclusion is that these questions must be determined adversely to the plaintiff.

As to the third question, whether the New York Central Railroad declared a dividend in scrip within the meaning of the section referred to, is to be determined from certain undisputed facts, which are as follows:

From the organization of the company, in 1853, to the time of the adoption of the resolution hereafter to be mentioned, the company had expended a large portion of its earnings in the purchase of real estate, the construction of additional tracks, and for general additions to its property. On the 19th day of December, 1868, its directors passed the following resolutions:

Whereas this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent. of the capital stock of the company; and whereas the several stockholders of the com
120 pany are entitled to evidence of such expenditure, and to re-imbursement of the same at some convenient future period:

Now, therefore, resolved, that a certificate, signed by the president and treasurer of this company, be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per cent. of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on the shares of the capital stock of the company; and that such certificates may be, at the option of the company, convertible into the stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

Resolved, That such certificates be delivered to the stockholders of this company at the Union Trust Company, in the city of New York, on the presentation of their several certificates of stock, and that the receipt of the certificate provided for in these resolutions shall be endorsed on certificates.

Pursuant to these resolutions, certificates were issued by the company to its stockholders, and a copy of the resolutions was annexed to each certificate. The certificates are in the following form:

THE NEW YORK CENTRAL RAILROAD COMPANY.

No. . Interest-certificate.

Under a resolution of the board of directors of this company, passed December 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that , being the holder

of shares of the capital stock of said company, is entitled to dollars, payable, ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

This certificate may be transferred on the books of the company on the surrender of this certificate.

In witness whereof the said company has caused this certificate to be signed by its president and treasurer this 19th day of December, 1868.

, *President.*

, *Treasurer.*

Was the action of the company, declaring a dividend in scrip, within the meaning of the act?

121 It is best to dismiss, at the outset, any distinction which may be claimed to exist between a "dividend in scrip" and a stock-dividend. Abstract definitions of the words "scrip" and "dividend" are not profitable in the inquiry.

The whole scheme of the portion of the internal-revenue act in which the section in question is found contemplates the taxation of incomes of individuals and corporations. Dividends are included as a well-known indicia of the income of corporations, and constitute the profits divided by them after paying the expenses of their business and operations. They are usually declared in money, but, as they are sometimes declared in stock, and known as scrip-dividends, and, as when so declared, they represent income as profits which are apportioned to stockholders in stock instead of in money, Congress, intending to reach income in every form, subjected to tax "dividends in scrip or money." The inquiry, then, is, were the interest-certificates as issued by the company a stock-dividend? If they conferred on the respective stockholders any greater interest in the earnings or capital of the corporation than they had before receiving them, then they were a stock-dividend, though called "interest-certificates." If they did not, they are not a stock-dividend. Congress did not intend to tax dividends in stock which were not so in fact, and did not seek, while in search of income, to subject to tax that which is not income. In other words, they do not intend to tax as stock-dividends those myths which, in the process known as watering stock, are sometimes assigned to shareholders of corporations as stock-dividends. This intent is apparent from the limitation expressed. The tax is imposed on dividends declared in scrip or money "due as part of the earnings, profit, income, or gains of such company." The certifi-

122 cates issued by the New York Central Railroad Company were issued as representing earnings and profits accruing from the operations of the company, and to that extent meet the requisites of a stock-dividend. But did they vest in its stockholders any greater interest in its earnings or capital than they had prior thereto?

In my judgment they did not. By the certificates and resolutions the stockholders are entitled severally to eighty per cent. more of the stock than they had before, "at the option of the company." In other words, each stockholder shall have additional stock to that amount if the company shall, in its discretion and at its pleasure, see fit to assign it to him.

The directors of the company reserve the right to decline, at their volition or caprice, to assign any additional stock. The stockholder

receives nothing, by the declaration of the resolutions and certificates, but the naked assurance of a possibility which, at some indefinite future period, may result to his advantage. It is in no sense a vested right capable of enforcement, for he never could compel the company to transfer to him additional stock. It is true that the resolutions and certificates entitle the stockholder to a dividend to be paid on the eighty per cent. "at the same time and ratably with dividends on the capital stock." But I fail to see how this, in any manner, enures to his advantage. The earnings of the company, instead of being applied to dividends on his capital stock, are applied on that and the certificates ratably, and, to the extent that he receives a dividend on the certificates, his dividend on the capital stock is reduced. The stockholder derives and the company appropriates no income by the transaction which would not have been derived and appropriated if the certificates had never been issued.

Another feature of the certificates is an important one, as making
123 a wide difference between their legal effects and that of a certificate of stock. The eighty per cent. is not to be paid out of the general assets and earnings of the corporation, neither are the dividends which are thereafter to be made. The dividends to be declared upon the certificates are only to be paid out of the future earnings of the company. Upon a dissolution of the corporation these certificate holders would receive no part of the assets, except those accumulated from the earnings after the certificates were issued. An assignment of all dividends thereafter to arise upon stock may, in law, amount to a transfer of the stock, because it would entitle the assignee to receive all the original stockholder could have obtained of the assets of the corporation. But a holder of these certificates would have no such right, and would not stand at all in the position of a stockholder towards the corporation in case of a dissolution.

It is not claimed that these certificates give to the holder the right to vote, and here again in an important feature these certificates fail to vest the holder with the rights of a stockholder.

Tested by all the rules by which we are to determine whether these certificates were certificates of stock, and as such entitle the holder to the rights of a stockholder in the corporation, the result is adverse to a conclusion in the affirmative. The tax was intended to be imposed upon gains and profits actually appropriated by the company and derived by the stockholder.

The section which imposed it authorizes the company to deduct or withhold from all payments, on account of any dividend due and payable as aforesaid, the tax of five per centum from the stockholder to whom the same is payable. Can it be seriously asserted that if the New York
Central Railroad Company had withheld five per cent. of the
124 eighty per cent. from the amount of its dividend next declared after it issued these certificates, and deducted that sum from the dividends due to a stockholder, the company would have been protected? The stockholder would have insisted that he had received no additional income by reason of the certificates, and it was not intended by the law to tax him through the corporation for that for which he could not be taxed personally.

Or suppose, again, the assessor had attempted to compel the stockholder to pay a five per cent. tax on a sum equivalent to eighty per cent. of his stock in the company, on the ground that the company had not deducted the tax from his dividend. Would it not be revolting to common sense to insist that he should pay on these certificates as income actually received by him, when he had not only received no income in

fact, but had not received that from which he could enforce or derive income in the future by any legal remedy?

If the certificates did not represent income received by the stockholders, they were not of the character which the law intended to reach because the dividends subjected to the tax were only those from which, by the act, the corporation could deduct the five per cent. imposed on the income of a stockholder, derived by him in the form of a dividend.

It is insisted, on behalf of the collector, that the resolutions and certificates were artfully expressed by those who originated them, with the design thereby to evade the payment of the tax in question, and that the company should not be permitted by artifice to escape payment of the tax. Whatever may have been the intent, if the company did not declare a dividend it did not become liable to the tax.

The tax is imposed on the act, not on the motive. While the stamp-act was in force, individuals frequently declined to take receipts
125 for payments, to save the cost of the stamps, but it has never been supposed that such individuals were liable for penalties.

Entertaining these views, my conclusion is that the tax was erroneously assessed, and the defendant must pay the amount realized by his proceedings.

Had the tax been assessed upon the "profits of such company, carried to the account of any fund or used for construction," it might have been enforced for the amount actually carried to the fund or used for construction since 1862, when the internal-revenue act was adopted. By the assessment made, it was attempted to compel the plaintiff to pay a tax on income derived and expended by it in construction for nine years prior to the adoption of the law, as well as that derived and expended for the six years after such law was passed. The gross injustice which would result if such an assessment was contemplated by the act affords a strong argument against any interpretation that would permit it. It is an elementary rule that no construction will be tolerated in a statute which will allow it to operate retrospectively.

It is unnecessary to discuss the effect of a remission of a portion of the tax by the Commissioner of Internal Revenue. The action now on trial must stand or fall upon the validity of the assessment upon which the warrant of distraint was issued and collected. If the railroad company was indebted to the Government for taxes because it had expended sums in construction on which it did not pay the tax, the amount so expended should have been ascertained from competent sources of information, and collected by assessment for the amount so expended or by action. The remedy by action still remains, having been preserved, although the act imposing the tax has been repealed.

126 In such an action the exact sum due, if any there is, can be ascertained and the amount collected.

To which ruling and decision of the court, to wit, that the New York Central Railroad Company did not declare a dividend in scrip by the issue of the so-called interest-certificates of December 19, 1868, within the meaning of section 122 of the internal-revenue law referred to, the counsel for the defendant then and there duly excepted.

The court thereupon directed the jury to render a verdict for the plaintiff for the sum of $504,002.89.

To which direction, ruling, and decision of the court the counsel for the defendant then and there duly excepted.

The jury thereupon, under such direction, rendered a verdict for the plaintiff for $594,002.89.

And because none of the said exceptions do appear by the said record,

the said counsel for the said defendant did then and there propose his aforesaid exceptions to the rulings, decisions, and direction of the said circuit judge, and requested him to put his seal to this bill of exceptions, containing the several matters so as aforesaid produced and given and offered in evidence, and the objections and exceptions thus made and taken, according to the form of the statute in such case made and provided and the practice of this court. And thereupon the said circuit judge, at the request of the said counsel for the defendant, has hereunto affixed his name and put his seal to this bill of exceptions.

WM. J. WALLACE, *Judge.* [L. S.]

127 (Endorsed:) U. S. circuit court, north. dist. of New York. Bill of exceptions. The New York Central & Hudson River Railroad Company vs. John M. Bailey. Richard Crowley, atty. for deft., Lockport. Filed September 4, 1874, as of the 1st day of July, 1874.

128 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the northern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the New York Central and Hudson River Railroad Company, plaintiff, and John M. Bailey, defendant, a manifest error hath happened, to the great damage of the said John M. Bailey, as by the complaint appears; and we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so

129 that you may have the same at Washington on the second Monday of October, A. D. 1874, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the fourth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

130 (Indorsed:) Supreme Court of the United States. John M. Bailey, plff. in error, v. The New York Central and Hudson River Railroad Company, deft. in error. Writ of error to the circuit court of the United States for the northern district of New York. Richard Crowley, atty. for plff. in error, Lockport, N. Y.

Allowed Sept. 4, 1874.

WM. J. WALLACE,
Judge U. S. Circuit Court.

Filed September 4, 1874.

131 UNITED STATES OF AMERICA,
Northern District of New York, ss :

To the New York Central and Hudson River Railroad Company, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the second Monday of October, A. D. 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein John M. Bailey is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this fourth day of September, A. D. 1874.

WM. J. WALLACE,
Judge of the Circuit Court of the United States for the Northern District of New York.

132 NORTHERN DISTRICT OF NEW YORK,
Albany City & County, ss :

James H. Kelly, being duly sworn, says : that he is a deputy marshal of the United States for said district, and resides at Albany ; that on the seventh day of September, 1874, at said city of Albany, in said district, he personally served the within citation on Henry R. Pierson, esq., executive director for the said New York Central and Hudson River Railroad Company therein mentioned, by delivering to and leaving with him, said Pierson, a true copy of said citation.

JAS. H. KELLY.

Subscribed & and sworn to Sept. 7, 1874, before me.

AMASA J. PARKER, JR.,
United States Commissioner in & for N. D. of N. Y.

(Indorsed :) Supreme Court of the United States. John M. Bailey plff. in error, vs. The New York Central and Hudson River Railroad Company, deft. in error. Citation ret'ble 2d Monday in October, 1874, at Washington, D. C. Richard Crowley, atty. for plff. in error, Lockport, N. Y. Filed September 9, 1874.

133 UNITED STATES OF AMERICA,
Northern District of New York, ss :

I, Charles Mason, clerk of the circuit court of the United States for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of The New York Central and Hudson River Railroad Company vs. John M. Bailey.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica, in said district, this 24th day of September, A. D. 1874.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsement on cover :) No. 528. John M. Bailey, late collector of internal revenue, plaintiff in error, vs. The New York Central and Hudson River Railroad Company. N. New York C. C. U. S. Filed 29t September, 1874.

O

In the Supreme Court of the United States.

JOHN M. BAILEY, COLLECTOR,
vs.
NEW YORK CENTRAL AND HUDSON RIVER R. R. CO. } No.

IN ERROR TO THE CIRCUIT COURT OF THF UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for the United States.

In the Supreme Court of the United States.

JOHN M. BAILEY, COLLECTOR,
vs.
NEW YORK CENTRAL AND HUDSON RIVER R. R. CO. } No.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for the United States.

This is a writ of error upon a judgment for $594,002.89, rendered against the plaintiff in error in a suit brought May 21, 1873, in the supreme court of the State of New York for Albany County, and shortly thereafter, upon the petition of said collector, transferred into the United States Circuit Court.

The action was in form as prescribed by the New York code, and sought the recovery of certain moneys paid under protest, &c., by the New York Central and Hudson River Railroad Company to the collector, as a tax upon an alleged dividend of scrip declared in December, 1868, by the *New York Central Railroad Company* to *its* stockholders.

The plaintiff is a company formed in November, 1869, by the consolidation of the New York Central, and the Hudson River Railroad Companies under an act of the State of New York, which provided, amongst other things, that—

The rights of all creditors of, and of all liens upon the property of either of said corporations, parties to said agreement and act, shall be preserved unimpaired and the respective corporations shall be deemed

to continue in existence, to preserve the same, and all debts and liabilities incurred by either of the said corporations, except mortgages, shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it (Record. p. 42 bottom)

The resolution adopted by the New York Central Railroad Company declaring said dividend, and the certificate issued in pursuance thereof, are as follows:

THE NEW YORK CENTRAL RAILROAD COMPANY.

Whereas, this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent. of the capital stock of the company; and whereas, the several stockholders of the company are entitled to evidence of such expenditure and to re-imbursement of the same at some convenient future period. Now, therefore:

Resolved, That a certificate, signed by the president and treasurer of this company, be issued to the stockholders, severally, declaring that such stockholder is entitled to eighty per cent. of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon at the same rates and times as dividends shall be paid on the shares of the capital stock of the company, and that such certificates may be, at the option of the company, convertible into stock of the company whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

Resolved, That such certificates be delivered to the stockholders of this company at the Union Trust Company, in the city of New York, on the presentation of their several certificates of stock, and that the receipt of the certificate provided for in these resolutions shall be indorsed on the stock certificate.

THE NEW YORK CENTRAL RAILROAD COMPANY.

Interest certificate.

No.

Under a resolution of the board of directors of this company, passed December 19, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that ——— being the holder of ——— shares of the capital stock of said company is entitled to — dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

This certificate may be transferred on the books of the company on the surrender of this certificate.

In witness whereof the said company has caused this certificate to be signed by its president and treasurer this 19th day of December, 1868.

——— ———, *President.*
——— ———, *Treasurer.*

For a valuable consideration — do hereby sell, assign, and transfer al —— interest in the above certificate to ——, and do hereby irrevocably appoint —— attorney to execute a transfer thereof on the books of the railroad company therein mentioned. (Record, p. 60 bottom)

The assessment, under which the tax was collected, was originally made on the 3d of March, 1870, and was as follows:

UNITED STATES INTERNAL REVENUE.

Assessment against the New York Central Railroad Company.

The New York Central Railroad Company having failed to make return of the scrip-dividend or interest-certificates voted at a meeting of the directors of said company, held December 19th, 1868, as required to do by section 122, act June 30, 1864, act July 13, 1866, internal-revenue laws.

Now, therefore, by the authority vested in me, and as required by the several sections of said internal-revenue laws, I do assess against the president, directors, and company of the New York Central Railroad the following tax, to wit:

Capital stock December 19, 1868	$28,795,000
Scrip-dividend or interest-certificates, being 80 per cent. of said capital	23,036,000
Tax on same at 5 per cent	1,151,800
Penalty for failure (section 122)	1,000
Amount of tax	1,152,800

RALPH P. LATHROP,
Assessor, 14th District, N. Y.

ALBANY, *March* 3, 1870.
(Record, p. 46)

Nothing was done under this assessment (or under certain notices in continuation and amendment thereof) by way of enforcement of the tax, until the 24th of February, 1872, at which time the following instructions

were received from the Commissioner of Internal Revenue, to whom the matter had been referred:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, February 24, 1872.

SIR: In the matter of the assessment against the New York Central Railroad Company, amounting to $1,152,800 tax, including $1,000 penalty, on the scrip dividend of $23,036,000, declared December 19, 1868, I have to say that, after hearing counsel for the company on the appeal made to me in the case, I have concluded that the company is liable to a tax of five per cent. (without penalty) on the sum of nine million two hundred and fourteen thousand four hundred dollars, ($9,214,400,) being six-fifteenths of the entire dividend, the proportionate amount chargeable to the periods between September 30th, 1862, and September 30th, 1868. This will reduce the assessment to the sum of four hundred and sixty thousand seven hundred and twenty dollars, ($460,720) which I have instructed Collector Bailey to collect. On its payment and the presentation of the proper vouchers, the remainder of the assessment, viz, $692,080, including the $1,000 penalty, will be abated.

Very respectfully, yours,

J. W. DOUGLASS,
Commissioner.

R. P. LATHROP,
Assessor, 14th Dtstrict.
ALBANY, NEW YORK.

(Record, p. 46)

In March and April, 1873, a part of the tax was collected from the proceeds of sales of property of the Central and Hudson River Railroad Company distrained upon by the collector, and in May thereafter the remainder was paid by that company under protest. (Record, pp. 43) 44)

Upon the trial the counsel for the defendant offered to read from the report of the Central Railroad Company for the year 1869, and from the report of the plaintiff for the years 1870, 1871, and 1872, for the purpose of showing that the interest-certificates were merged in the capital stock of this plaintiff in the year 1872, and that dividends were declared and paid on such interest-certificates in 1869, 1870, and 1871, the same as upon the capital stock.

The counsel for the plaintiff objected to the introduction of such evidence.

The court sustained the objection, and the counsel for the defendant excepted.

The court, after instructing the jury that the assessment of the tax in question was valid against the Central Railroad Company, *upon the assumption that it had declared a dividend in scrip within the meaning of the internal-revenue act*, and that, if valid, it justified the seizure and sale of the property of the Central and Hudson River Railroad Company, proceeded as follows: (Record, pp. 74, and seq.)

Was the action of the company—declaring a dividend in scrip within the meaning of the act?

It is best to dismiss at the outset any distinction which may be claimed to exist between a "dividend in scrip" and a stock-dividend. Abstract definitions of the words "scrip" and "dividend" are not profitable in the inquiry.

The whole scheme of the portion of the internal-revenue act in which the section in question is found, contemplates the taxation of incomes of individuals and corporations. Dividends are included as a well-known indicia of the income of corporations, and constitute the profits divided by them after paying the expenses of their business and operations. They are usually declared in money, but as they are sometimes declared in stock, and known as scrip-dividends, and as when so declared they represent income as profits which are apportioned to stockholders in stock instead of in money, Congress, intending to reach income in every form, subjected to tax "dividends in scrip or money." The inquiry then is, were the interest-certificates, as issued by the company, a stock dividend? If they conferred on the respective stockholders any greater interest in the earnings or capital of the corporation than they had before receiving them, then they were a stock-dividend though called "interest-certificates." If they did not, they are not a stock-dividend. Congress did not intend to tax dividends in stock which were not so in fact, and did not seek, while in search of income, to subject to tax that which is not income. In other words, they do not intend to tax, as stock dividends, those myths which, in the process known as watering stock, are sometimes assigned to shareholders of corporations as stock-dividends. This intent is apparent from the limitation expressed The tax is imposed on dividends declared in scrip or money, "due as part of the earnings, profit, income, or gains of such company." The certificates issued by the New York Central Railroad Company were issued as representing earnings and profits accruing from the operations of the company, and to that extent meet the requisites of a stock-dividend. But did they vest in its stockholders any greater interest in its earnings or capital than they had prior thereto?

In my judgment they did not. By the certificates and resolutions the stockholders are entitled severally to eighty per cent. more of the stock than they had before, "at the option of the company." In other words, each stockholder shall have additional stock to that amount if the com-

pany shall, in its discretion and at its pleasure, see fit to assign it to him.

The directors of the company reserve the right to decline, at their volition or caprice, to assign any additional stock. The stockholder receives nothing by the declaration of the resolutions and certificates, but the naked assurance of a possibility which, at some indefinite future period, may result to his advantage. It is in no sense a vested right, capable of enforcement, for he never could compel the company to transfer to him additional stock. It is true that the resolutions and certificates entitle the stockholder to a dividend to be paid on the eighty per cent. "at the same time and ratably with dividends on the capital stock." But I fail to see how this, in any manner, enures to his advantage. The earnings of the company, instead of being applied to dividends on his capital stock, are applied on that and the certificates ratably, and to the extent that he receives a dividend on the certificates, his dividend on the capital stock is reduced. The stockholder derives and the company appropriates no income by the transaction which would not have been derived and appropriated if the certificates had never been issued. Another feature of the certificates is an important one; as marking a wide difference between their legal effects and that of a certificate of stock. The eighty per cent. is not to be paid out of the general assets and earnings of the corporation, neither are the dividends which are thereafter to be made. The dividends to be declared upon the certificates are only to be paid out of the future earnings of the company. Upon a dissolution of the corporation these certificate-holders would receive no part of the assets, except those accumulated from the earnings after the certificates were issued. An assignment of all dividends thereafter to arise upon stock may, in law, amount to a transfer of the stock, because it would entitle the assignee to receive all the original stockholder could have obtained of the assets of the corporation. But a holder of these certificates would have no such right, and would not stand at all in the position of a stockholder towards the corporation in case of a dissolution.

It is not claimed that these certificates give to the holder the right to vote, and here again in an important feature, these certificates fail to vest the holder with the rights of a stockholder.

Tested by all the rules by which we are to determine whether these certificates were certificates of stock, and as such entitle the holder to the rights of a stockholder in the corporation, the result is adverse to a conclusion in the affirmative. The tax was intended to be imposed upon gains and profits actually appropriated by the company and derived by the stockholders.

The section which imposed it authorizes the company to deduct or withhold from all payments on account of any dividend due and payable as aforesaid, the tax of five per cent. from the stockholder to whom the same is payable. Can it be seriously asserted that if the New York Central Railroad Company had withheld five per cent. of the eighty per cent. from the amount of its dividend next declared after it issued these certificates, and deducted that sum from the dividends due to a stockholder, the company would have been protected? The stockholder would have insisted that he had received no additional income by reason

of the certificates, and it was not intended by the law to tax him through the corporation for that for which he could not be taxed personally.

Or suppose, again, the assessor had attempted to compel the stockholder to pay a five per-cent. tax on a sum equivalent to eighty per cent. of his stock in the company, on the ground that the company had not deducted the tax from his dividend, would it not be revolting to common sense to insist that he should pay on these certificates as income actually received by him, when he had not only received no income in fact, but had not received that from which he could enforce or derive income in the future by any legal remedy?

If the certificates did not represent income received by the stockholders, they were not of the character which the law intended to reach, because the dividends subjected to the tax were only those from which, by the act, the corporation could deduct the five per cent. imposed on the income of a stockholder, derived by him in the form of a dividend.

It is insisted, on behalf of the collector, that the resolutions and certificates were artfully expressed by those who originated them, with the design thereby to evade the payment of the tax in question, and that the company should not be permitted, by artifice, to escape payment of the tax. Whatever may have been the intent, if the company did not declare a dividend, it did not become liable to the tax.

The tax is imposed on the act, not on the motive. While the stamp-act was in force, individuals frequently declined to take receipts for payments to save the cost of the stamps, but it has never been supposed that such individuals were liable for penalties.

Entertaining these views, my conclusion is that the tax was erroneously assessed, and the defendant must pay the amount realized by his proceedings.

Had the tax been assessed upon the "profits of such company, carried to the account of any fund, or used for construction," it might have been enforced for the amount actually carried to the fund or used for construction since 1862, when the internal-revenue act was adopted. By the assessment made, it was attempted to compel the plaintiff to pay a tax on income derived and expended by it in construction for nine years prior to the adoption of the law, as well as that derived and expended for the six years after such law was passed. The gross injustice which would result if such an assessment was contemplated by the act, affords a strong argument against any interpretation that would permit it. It is an elementary rule that no construction will be tolerated in a statute which will allow it to operate retrospectively.

It is unnecessary to discuss the effect of a remission of a portion of the tax by the Commissioner of Internal Revenue. The action now on trial must stand or fail upon the validity of the assessment upon which the warrant of distraint was issued and collected. If the railroad company was indebted to the Government for taxes, because it had expended sums in construction on which it did not pay the tax, the amount so expended should have been ascertained from competent sources of information, and collected by assessment for the amount so expended, or by action. The remedy by action still remains, having been preserved, although the act imposing the tax has been repealed.

In such an action the exact sum due, if any there is, can be ascertained and the amount collected.

To which ruling and decision of the court, to wit: That the New York Central Railroad Company did not declare a dividend in scrip by the issue of the so-called interest-certificates of December 19, 1868, within the meaning of section 122 of the internal-revenue law referred to, the counsel for the defendant then and there duly excepted.

The court thereupon directed the jury to render a verdict for the plaintiff for the sum of $594,002.89.

To which direction, ruling, and decision of the court, the counsel for the defendant then and there duly excepted.

We assign for error:

I. The action of the court below excluding the report of the New York Central Railroad Company, and the reports of the plaintiff below, offered by the defendant for the purpose of showing that the interest-certificates were merged in the capital stock of such plaintiff in the year 1872, &c., &c. (Above, p. 4)

II. Also, the instruction of the court that the action of the New York Central Railroad Company, as evidenced by the resolution and certificates issued December 19th, 1868, was not a declaration of a dividend in scrip within the meaning of the United States' internal-revenue act then in force. (Above, p. 7)

III. Also, the direction given by the court to the jury to render a verdict for the plaintiff below for the sum of $594,002.89, and the judgment given therefor. (Above.)

I. We will dismiss the first assignment of error with the suggestion that the important point being the meaning of the transaction of December, 1868, any subsequent dealing of the parties thereto calculated to throw light thereupon, is competent evidence of such meaning and is one of the ordinary instruments of proof. If, in 1872, the plaintiff, as representative of the Central Company, converted these certificates into stock, and thereby secured to some extent not only dividends thereon, but, as suggested by the plaintiff below, their *principal*, such act is evidence that the parties to the transaction of 1868 regarded such certificates as conveying to their holders more than a mere estimate of the future business of the company and its probable future dividends.

II. Some question seems to have arisen below as to the effect to be allowed to a scheme devised in evasion of a statute, it being suggested that upon its face the above certificate was shaped in order to evade at once a New York statute which allows the legislature to intervene in case the dividends of a corporation exceed ten per cent., and the United States revenue statute upon dividends in scrip. We admit that there may be such a thing as successful evasion. Schemes of evasion must, however, be technically *perfect*, or fail entirely. No *equity* arises thereupon to rectify mistakes or supply omissions. The equities are all upon the other side.

In discussing the second assignment, we will *first* state our views of the transaction between the Central Company and its stockholders, evidenced by the above "resolution" and "interest-certificate" of the 19th of December, 1868, and *then* we will submit an interpretation of the statutory revenue provision applied thereto by the plaintiff in error.

1. Putting aside disputed terms, we suppose that it will be admitted that the resolution and certificate witness a dealing between the company and its stockholders, based upon *earnings* theretofore made, in the course of which a written or printed instrument had been delivered by the company to each of its stockholders as *evidence* of such earnings, and of their having been expended *in constructing and equipping the road and in the purchase of real estate and other properties:* also that they were to be *re-imbursed at some convenient future period;* two different methods of redeeming such instrument being left optional with the company, viz, *its payment out of future earnings*, or *its conversion into stock-dividends thereon* being in the mean time payable *at the same rates and times as upon shares of the capital stock.*

(1.) The paper, therefore, is upon its face, *evidence* for each stockholder to persons with whom he may deal, *against the company*—

(*a*) of previous earnings.

(*b*) of the expenditure (or investment) of such earn-

ings to a specified large amount, in construction, equipment, and purchase of property ; and

(*c*) that certain dividends will accrue, *pari passu*, &c., upon the amount specified therein.

(2.) It is also upon its face *notice* to such stockholder and his assignees, that the company have a right to call it in whenever it may choose, and either pay it off or convert it into stock.

It is said that the holder of one or more of these certificates has *no rights whatever* except to the *dividends* mentioned : that for the principal sum mentioned in the certificate, he has no promise except the *optional* one specified therein, and that upon the whole the certificate effected nothing more than the substitution of two bits of paper for one, inasmuch as the stockholder who received it gained nothing by it which he had not before under his certificate of stock.

The reduction of a transaction having so solemn an exterior to a substance so vanishing as this, devolves a great burden of argument, as it seems, upon those who have assumed the task.

We submit that, on the contrary, this double option as to dealing with the subject-matter of the certificate does not exhaust the duty of the company to its holder; but that over and beyond such option it owes to such holder a duty arising out of the nature of the transaction, a duty which is, indeed, not technically a *debt* or an implied *absolute* assumpsit, but is of like sort with that implied in behalf of those who hold stock, viz, that at all events he shall have a pro-rata share in the distribution of whatever assets may remain at the dissolution of the company.

In this connection, we submit that the court below, in dismissing at the outset, any distinction between "scrip" and "stock" (above, p. 5,) and thereupon, in treating the case of the collector as if it depended upon whether the transaction were a dividend of *stock*, fell into an inadvertency which is a main cause of the error which we allege.

Nevertheless, reserving for a later part of this brief the drawing of the distinction which exists between these

things, let us first ascertain the characteristics of a dividend of stock, such ascertainment lying in the way to a definition of the transaction in question. It being admitted upon the other side (and being to all appearances indisputable,) that if this transaction had been a dividend of stock, the present action must fail, it seems true that if incidents to this transaction which are objected as inconsistent with the requisites of the revenue act, are equally incidents to a stock-dividend based upon earnings, such inconsistency is so far only imaginary. If a stock-dividend having incidents like those of this transaction, be within the act, so also may the transaction itself.

We admit in passing, that the question before the court turns upon the transaction of December 19, 1868, *as it stood upon that day*, and that matters happening thereafter in consequence thereof, have no interest except so far as they reflect light upon what then happened.

(a.) It is said by the court (above, p. 5 ,) that the transaction did not vest in its stockholders any greater interest in the earnings or capital of the company than they had before.

The same would have been true in the same sense had it been a dividend of stock based upon earnings. The stockholder who had a beneficial interest in a tenth part of the capital would, after receiving a dividend of stock, still have had no more than a tenth. After receiving a dividend of a tenth part of the stock, he would also still have had no greater interest in the road, rolling-stock, or other capital of the company than he had before. This would all have remained the property of the *company*, and no part of it have become, because of such dividend, property of the *stockholder*. (Van Allen *v.* The Assessors, 3 Wall, p. 584) We submit that the proposition that dividends transfer to stockholders property which previously belonged to the company, is true only of ordinary dividends, and never of dividends of stock. The subject-matter of a stock-dividend is a thing created, *not transferred*, by the *declaration*. It is a *chose*, taking the place of an *aliquot share* in capital. (Frazer

v. Seibern, 16 Ohio St., p. 620.) That which a stockholder obtains is not a thing previously held by the company; but is only a definite and formal partition of some beneficial interest in the capital of the company, which previously he had held indefinitely, and in common with other stockholders. Of this, the certificate is *evidence.*

(b.) Again, dividends of stock do not *per se*, as intimated by the court, (above, p. 6 ,) entitle the holder to any additional vote in a company. Whether they do so in any particular case depends upon the charter. The question now before the court cannot turn upon matters merely incidental to stock, but depends upon the nature of stock *per se.*

Angell and Ames define a share of stock to be "a right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted." (9th ed., sec. 557.) This, as a general definition, would be defective, if it included the non-essential peculiarities of one or other sort of stock. Nothing is said of the supposed right to vote. So far as a *stockholder* is a *member* of the company, he has such right; but this right does not necessarily increase with an increase of stock, or lessen with its diminution. We cite in this connection the very learned and well-reasoned opinion of that eminent magistrate, Hornblower, in 2 Green, (N. J.) p. 222, Taylor *vs.* Griswold.

The above is an objection to the views of the court on this point, entirely distinct from one analogous to that above, as to the *proportion of property* held by stockholders who have received a dividend of stock, viz., that supposing it to be proper to take notice of the various *charter provisions* upon this subject, the *proportion* of their weight as voters is not disturbed, at least is not increased, by such dividend.

(c.) It seems also that the *test* applied by the court (above, p. 6 ,) i. e., *a deduction or withholding of the tax paid by the company* from all payments to the stockholder on account of any dividend, &c., would have the same bearing upon a *stock dividend*, as upon the transaction under consid-

eration. In any conceivable case of a "dividend *in scrip*," that which is due to the tax-gatherer is a thing of a different sort from that which has been divided among the stockholders. There can therefore be no deduction in kind. Still a prosperous business by the company, which is implied in such dividends, and a previous *notice* to its authorities of the amount of the demands of the Government because of the transaction, *given by the revenue law*, make this solution of the question a matter of no difficulty in practice.

(*d.*) The only point in which, as occurs to us, it seems questionable whether what is objected to the present transaction as a subject of taxation, is not to be objected as well to a dividend of stock, is that of the rights of the holder of the certificate, as such, to a share in the assets after a dissolution of the company.

Even here it seems not difficult to maintain that the holder of such certificate is entitled, upon such dissolution, in case the assets remain as at the time of its issue, or be increased, to the eighty dollars mentioned upon its face. Whether upon the diminution of such assets the certificate-holders would be *postponed* to the stockholders, seems unnecessary to discuss. All that seems material is, to maintain that such certificate-holders had at their issue a trust which attached upon the assets and business of the company, as well for principal as for interest, just as if they had been holders of stock.

"Certificates of stock are simply muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member." (The Mechanics Bank *vs.* New York R. R. Company, 3 Kernan, p. 627.) We take it that this means, evidence to *affect persons outside of the corporation*, as the corporation and its stockholders hardly need such evidence, having in their hands already the *original documents*, (*i. e.*, the corporation books and papers,) from which the certificate is, as it were, only a deduction. Bank *v.* Burr, 24 Me., 256.

The "resolution" before the court speaks of the stockholders as being *entitled* to these certificates, as *evidence* that certain earnings of the road had been invested to a

certain amount in that property which ordinarily constitutes railroad capital. We understand that this evidence was intended to be, like that above, *evidence to parties outside; evidence* upon which bargains might be made, and trading done. This interpretation of the provision in the resolution is borne out by the insertion of a *transfer clause* in the certificate.

The resolution provided not only for *evidence* of the expenditure, but for its *re-imbursement at some convenient future period.* We submit that it is always in law *convenient* for companies that are being wound up, to apply their assets to the re-imbursement of those from whom they were obtained; it *may be* convenient at other times, it *must be* so then; *i. e.*, that the above certificates are at all events payable, as its stock is, at the dissolution of the Central Railroad Company, or of such company as may be its successor and representative.

It seems that the word "option," usual in contracts of this sort, suggests a like conclusion. It is said, in effect, upon the other side that this word reserves to the company a choice of *being bound.* We think that the choice reserved is that of *being free*, at least *comparatively*, *i. e.* that, but for an exercise of the option, some other obligation as to this *eighty dollars* binds the company, relief from which was, at the inception of the contract, contemplated by the latter as a thing which in the progress of events might become desirable, and therefore was reserved. Our views upon this point in full are, that the company, finding that by the application of previous *earnings* its capital had increased in substance by eighty per cent., not having that amount in hand in cash, and not being authorized to issue additional shares of stock, pressed also by some motive for enlarging the area of the dividend-yielding subject, devised this method of apportioning amongst its stockholders such additional capital—distributable in the end as its other capital, subject however to a condition, *in favor of the stock*, of being paid off before. This condition might effectually preclude certificate-holders from questioning the right of the stockholders to the exclusive benefit of any subsequent increase of capital, at the same time that it

allowed the value of the certificate to *fall* as such capital became diminished.

As another view of the obligation of the company arising out of this transaction, we submit that, whilst there exists an *option* to pay the certificate off out of future earnings, and another *option* to convert it into stock, the company is bound to do either the one or the other. This suggestion seems to us more reasonable than that made upon the other side; although we rely mainly upon the previous interpretation submitted to the court.

2. We will now proceed to submit an interpretation of the revenue provision of the United States in question; viz, that in the 9th section of the act of July 13, 1866, (14 Stat. 138, bottom.)

Laying aside irrelevant matters, this provision is, "That any railroad company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to, and pay a tax of five per centum on the amount of all such dividends or profits, whenever or wherever the same may be payable and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of dividends due and payable as aforesaid, the tax of five per centum; and the payment of the said tax so deducted from the dividends, &c., shall discharge said company from that amount of the dividend."

Under this statute, a dividend in scrip declared by a railroad company, as part of its earnings, is subject to a

tax, whenever, or wherever, and to whomsoever, it may be payable. That which is required to be *due*, is *the scrip*, not money or proceeds of it. Scrip is due, at all events, when delivered without any provision postponing its effect. Scrip is not stock, or necessarily a certificate of stock. It may be a certificate of what may be termed *inchoate stock*, and it may be a certificate of that which is substantially in the nature of stock, and no more. The Reports present to our attention many varieties of scrip, and will, no doubt, continue to present many new ones in the future. We submit that any document which confers upon its holder some of the principal fruits of *stock*, as the latter is defined in the books, is at least *scrip*. This proposition seems to be beyond dispute where such document is issued *to parties already stockholders*, especially in case it expressly contemplates its own contingent conversion into stock. Inasmuch as this certificate conferred upon those to whom it was issued, a right which is regarded in the books as a test of stock (Angell and Ames, above) it seems beyond all reasonable doubt to be *scrip*.

It is said by the court (above, p. 7,) that *if the tax had been assessed upon the "profits of such company, carried to the account of any fund, or used for construction," it might have been enforced for the amount actually carried to the fund, or used for construction since* 1862, *&c.* Admitting, for the sake of argument, the truth of this proposition, we submit with confidence that where a fund composed of earnings expended (i. e. *invested*) in construction, &c., or carried to any account whatever, is made the basis of scrip *distributed amongst the several stockholders of a company*, whatever other term in the revenue law may be applicable thereto, the transaction creates also a partition or distribution, i. e. a *dividend*, A DIVIDEND IN SCRIP!

Although we have met with no case which bears

much resemblance to the present, we refer to two or three which seem to throw light upon one or other of the points under discussion.

In Minot *vs.* Paine, 99 Mass., 101, in accordance with numerous cases therein quoted, it is held that stock-dividends, even when based upon the *income* of a corporation, become at once a part of the *capital*, not of the income, of the stockholder. This indicates that difficulties suggested by a consideration of how a tax specifically imposed upon "dividends in scrip," affects the *income* of the stockholder, are not important.

In Boston and Lowell R. R. Company *vs.* Commonwealth, 100 Mass., 399, the directors of a company voted, November 26, 1866, a dividend payable in accordance with the following certificate ordered by them to be incorporated into each certificate of stock. "There will be due and payable on Oct. 1, 1873, to the then holder of these shares twenty per centum, &c., payable either in stock at par or in money, at the option of this company, &c., and until said Oct. 1, 1873, interest from Jan. 1, 1867, at the rate," &c.

The court said: "For reasons no doubt satisfactory at the time, it was not thought advisable to issue new stock to the then stockholders in the form of a dividend. But the action taken seems to have reached practically the same result to them. * * * The fact that a dividend is earned and declared must necessarily increase the market value of the stock, and keep it up until the time of payment of the same has passed."

We submit that the certificate here *incorporated*, &c., was *scrip*, and that the *dividend in scrip* was made in 1867; and that the case illustrates the position that, whether a tax should be laid upon such dividend, or be postponed until the money thereon be realized is, in view of the fact that such dividend has an immediate pecuniary value to the stockholders, a matter of *policy*, to be decided by the legislature alone.

So in Brown *vs.* The Lehigh Co., 49 Pa., 270, if the "scrip-shares" issued had been entitled to cash divi-

dends at once, we submit that it would have been a case of a dividend in scrip *due* on the 1st of May, 1855.

The Lehigh Canal Co. vs. The Commonwealth, 55 Pa., 448, is a case of "legerdemain" in regard to *dividends*, unsuccessfully practiced in order to avoid a tax. See also Ohio *vs.* Farmers' Bank, 11 Ohio, 94.

GEORGE H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor-General.

IN THE

Supreme Court of the United States.

THE NEW YORK CENTRAL AND HUDSON RIVER R. R. CO., Defendant in Error,

vs.

JOHN M. BAILEY, Plaintiff in Error.

ARGUMENT OF ROSCOE CONKLING,

FOR DEFENDANT IN ERROR.

Jos. L. Pearson, Printer, 9th and D streets, Washington, D. C.

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Supreme Court of the United States.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Defendant in Error,*

vs.

M. BAILEY, *Plaintiff in Error.*

ARGUMENT OF ROSCOE CONKLING,

For the Defendant in Error.

The action is in substance trespass, for seizing property and exacting money of the plaintiff below, amounting to $594,002.89.

The sole defence is a justification under an alleged assessment on a "scrip dividend," and distraint under said assessment. The issue is the validity of the assessment and distraint, and this issue, should the assessment and distraint be found regular in themselves, will embrace the enquiry whether certain "certificates" were or were not taxable under one of the income sections of the internal revenue acts.

The certificates were issued December 19, 1868, not by the defendant in error, but by the New York Central Railroad Company.—(Record, p. 8.) This corporation ceased to be on the 1st of November, 1869. The so-called assessment did not occur till March 3, 1870, four months afterward, and it was against the dead corporation alone.

The act of assessment was without notice or proceeding, as required by the statute. The assessor, at the dictation of another person not authorized to make assessments, sat down alone in his office, without notice to anybody, and noted on a paper a supposed total of certificates issued, which total he took from a document theretofore printed by the legislature of New York, and which total was proved on the trial to be erroneous by a million dollars or thereabout.—(Record, 102.) This paper, stating that a five per cent. tax was due on the total thus assumed, and stating that the corporation which issued the certificates was charged with the tax and a penalty of $1,000 besides, was handed to the collector the day after it was made.

Nothing else by way of assessment was ever done. No hearing was allowed or time permitted.

No regular list or roll, annual or special, was proved, but the collector, by notice (not in itself complying with the statute) to the extinct corporation, and eventually, after nearly two years, by notice inaccurately addressed to the defendant in error, demanded payment of the assessment.

Still later six-fifteenths of the assessment, in lieu of the whole, was required, and finally the collector issued in succession to his deputy three warrants, two against the old company or the defendant in error, in the alternate, and one against the plaintiff alone.

On these three warrants seizures were made of property of great value, none of which had ever belonged to the company assessed, and under threats that all its property would be seized, the defendant in error paid $594,002.89, at the same time protesting.

Pending this exaction, the question of the liability of the certificates to taxation was referred by the revenue bureau to its law officer, the solicitor, and he, in a written opinion, held that the certificates were not among the objects of taxation visited by the revenue acts. The

matter was still later submitted by the Treasury Department to ex-Commissioner of Internal Revenue William Orton, ex-Supervisor of Internal Revenue John F. Smyth, and Ralph P. Latrop, the assessor who, under direction, had made the so-called assessment. This board of arbitrators or commissioners decided that the certificates were not taxable.—(Record, pp. 11, etc.; see folio 30, p. 19.)

In front of the points to be discussed, one general observation is submitted. The defendant in error is the only party, whether on the record or not, whose interest can be concluded or impaired by any decision in the case. The defendant below is of course not to be held responsible personally. An affirmance of the judgment can in no sense bar or diminish the right of the United States. If in truth taxes legally due remain unpaid by the New York Central R. R. Co., or its successor, the courts are open and the remedy is ample. An action of debt is given by the common law, and by statute also. No statute of limitations stands in the way; all time is the government's; both sides can be heard, and every item of arrears can be searched out.

On the other hand, the defendant in error must escape from the pretended assessment, before in any forum enquiry can be made, except whether these particular certificates are on their face a "scrip dividend," and as such liable to the income tax; whereas, if there be a real delinquency, it is of a different nature.

The defendant in error stood at the commencement of this action as an adjudged delinquent—as a judgment debtor—and yet it never had been heard.

There being no doubt of the responsibility of the alleged debtor, and nothing in the case to work an estoppel against the United States, and the question arising under a spent statute in a case not resembling any other

to be determined, it is believed that no meritorious interest will suffer from a full scrutiny of official acts which we think were not only illegal and void, but oppressive.

Before reaching the nature or quality of the certificates referred to, we find several faults with the doings of the revenue officers, which it is believed must determine the case against the plaintiff in error.

First.

No assessment was made which the law would tolerate in any case, however clear the liability to tax, even if aimed at the right party during his life.

The assessor could do only what the statute permitted and directed him to do; and at the time of the alleged assessment, March 3, 1870, he could do nothing unless the New York Central Company was in default according to the statute. There must have been a time certain when the corporation was bound to make a list or return of a "scrip dividend" of $23,036,000, which return it neglected to make, or made falsely. The default was a jurisdictional fact, and a condition precedent to any action whatever by the assessor. Assuming that default had been made, the action of the assessor was illegal and void, because in disregard of the provisions applicable to the case. In case of default, the act of Congress points out the way, and the only way, in which the assessor may proceed. The alleged delinquent must be summoned or notified, and given a hearing with a view to "*the ascertainment* of liability *to tax*." An inquiry must be made into the facts, and the assessor or his deputy must view, consider, and determine judicially. Time and opportunity must be given for appeal to the assessor; and this *quasi* judicial examination is secured during the whole fifteen months within which the tax claimed may be pursued by assessment. Every one of these provisions was disregarded, and by a mere *ipse dixit* without the semblance of assessment or hearing, and without any notice

known to the law, requisition was suddenly made for $1,151,800 tax, and $1,000 "penalty for failure, sec. 122."

If no default had been made, no action by the assessor was lawful. If default had been made, the statute prescribes exactly what might be done by the assessor, and the statute is exclusive. In the language of this court, when a statute creates an officer, and says that he may do a thing in a certain way, a prohibition is presumed to his doing it in any other way.

Section 122 of act of 1864 declares:

"And in case of any default in making or rendering such list or return, or of the payment of the tax or any part thereof as aforesaid, the assessment and collection of the tax and penalty *shall be made according to the provisions of law in other cases of neglect or refusal.*"

Every person is, by the statute, required to make to the assessor a return by a certain day.

I call attention to the fact that the section requiring a list or return to be made covers this case, and every other case of a taxable object. Section eleven requires every person liable to tax "to make a list or return, verified by oath or affirmation, of the articles or objects charged with special duty or tax." The words "objects charged with special duty or tax" are equivalent to "subjects of taxation," and they embrace such a matter as is now before us, if it be taxable, and every other matter embraced in the revenue acts.—(Wells, Fargo & Co. v. Shook, 8th Blatchford, 254; see particularly 257.)

If the New York Central Railroad Company did not comply fully and truly with its duty on or before the day when it should have done so, the assessor was authorized to act, and he was directed how to act. He might proceed under section fourteen of the act of 1864. A preceding section provides, if a person is absent, how notice shall be given to make return. If he is present and illiterate, and unable to make a return, and will state the facts, the

assessor is to make it for him, and then it is to become a good return. Now comes the case of default (sec. 14):

"If any person, on being notified or being required as aforesaid, shall refuse or neglect to render such list or return within the time as aforesaid; or if any person without notice as aforesaid shall not deliver a monthly or other list or return by the time required by law; or if any person shall deliver or disclose to any assessor or assistant assessor any list, statement or return, which in the opinion of the assessor is false or fraudulent, or containing any understatement or undervaluation, it shall be lawful for the assessor to summon such person, his agent, or other person having possession, custody, or care of books of account containing entries relating to such person or any other person as he may deem proper, to appear before such assessor, produce such books at any time or place therein named, to give testimony, to answer interrogations under oath or affirmation respecting any objects liable to tax as aforesaid on the lists, statements or returns thereof on any trade, business, or profession liable to tax as aforesaid; and the assessor may summon as aforesaid any person residing or found within the state in which his district is situated; and when the person intended to be summoned does not reside, and cannot be found within the state, then the assessor may enter any collection district where such person may be found and there make the examination, hereinbefore authorized, and to this end he shall have and may exercise all the power and authority he has or may lawfully exercise in the district to which he is commissioned. The summons authorized by this section shall, in all cases, be served by an assistant assessor of the district where the person to whom it is directed may be found, by an attested copy delivered to such person in hand, or left at his last or usual place of abode, allowing such person at the rate, etc. * * * *; providing that if any person so summoned shall refuse to obey such summons, or to give testimony, or to answer interrogations as required, it shall be lawful for the assessor to apply to the judge of the district court, or to a commissioner of the Circuit Court of the United States for the district within which the person so summoned resides, for an attachment against such person for contempt. It shall be the duty of the judge or commis-

sioner to hear such application, and if satisfactory proof be made to issue an attachment, etc. * * * * Upon such hearing the judge or commissioner shall have power to make such order as he shall deem proper, not inconsistent with the provisions of existing law, for the punishment of contempt, and to enforce obedience to the summons, etc. It shall be the duty of the assessor or assistant assessor of the district within which such person may have taxable property to enter into and upon the premises, if it be necessary, of such person so refusing or neglecting, or rendering a false or fraudulent return, *and to make according to the best information he can obtain, including that derived from the evidence elicited by the examination by the assessor, and on his own view and information, such list or return, according to the form prescribed, of the property, goods, merchandise, wares, and all articles or objects liable to tax, owned or possessed, or under the care or management of such person, and assess the tax thereon, including the amount, if any, due for special or income tax.*"

Passing over words not applicable to the case, as to neglect by sickness, and so on, we find the following:

"And the list or return *so made*, and subscribed by said assessor or assistant assessor, shall be taken and reputed as good and sufficient for all legal purposes."

There is a section—not the only one—pointing out particularly in every case of default as to making returns, and of omission or undervaluation in the return made, the function, power, and duty of the assessor, and all of it. Other sections confirm this one. These provisions are designed to preserve something, at least in form, of the right to due process of law. It is a rigorous, a summary, and a searching statute on the side of the United States. It requires discovery of books and papers, and compels full disclosure, punishing any shortcomings heavily. The next section denounces a penalty of $1,000 for disobedience to the summons of the assessor, or for refusing to produce any books or papers in his judgment necessary. On the other hand, the statute assures to the alleged delinquent an opportunity for defence and resist-

ance, and a hearing. He may make proof and justify his alleged default, in law or in fact, if he be justifiable in whole or in part.

Under section 19 of this statute the party against whom default is alleged has the right of appeal to the assessor. He may ask him to determine, in the language of the law, according to law and right, and here again witnesses may be heard and compelled to attend. No appeal can be allowed, however, after the list is delivered to the collector; and in the present case the paper relied upon as the "list" was delivered within twenty-four hours after it was made, and all the requirements permitting an appeal were disregarded and forstalled.

Section 14 is not, however, the only section giving permission and prescribing limits to the assessor. I come now to the most sweeping section, section 20, and call attention to the fact that if at any time during the fifteen months, which is the lifetime of the assessor's right, he proceeds as for default, still he must proceed always according to the directions and requirements of the fourteenth section. He must give notice to the party; he must summon him; he must hold an investigation; he must afford that hearing which the law guarantees to all. "And in case it shall be ascertained that the annual or any other list which may have been or shall hereafter be delivered to any collector is imperfect or incomplete in consequence of the omission of the names of persons or parties liable to tax, or in consequence of an omission, understatement, or undervaluation, or false or fraudulent statement contained in any return or returns made by any person or parties liable to tax, the said assessor may, from time to time, at any time within fifteen months from the passage of this act, or the time of delivery of the list to the assessor as aforesaid, enter upon any monthly or special list the names of such persons or parties so omitted, together with the amount of tax for which they may have become liable, and also specifying—" I pass

on to these words—"And all provisions of law for the ascertainment of liability to any other tax, or the assessment or collection thereof, *shall be held to apply, as far as may be necessary, to the proceedings herein authorized and directed.*"

One of two things was true, if default had been made in this instance in March, 1870. Either the New York Central Railroad Company had failed to make return, and was so in default; or its return, made of the interest and dividends paid upon these certificates, contained "an omission, undervaluation, or fraudulent statement;" these are terms of the statute. The notice of special matter alleges that the default consisted in having made no return whatever. For our purpose it is immaterial whether the allegation be of default by reason of an omission in the return, or default by reason of omitting to make return altogether. In either event, these sections of statute took hold, and the assessor, to proceed before the roll was delivered to the collector, must act under the section first read. Upon discovery, after the roll had been delivered to the collector, he may act under the fifteen-month provision; but, in either or both cases, he must act in the mode pointed out by the statute.

The court should be here reminded that express notice of the issue of the certificates in question, was promptly given more than once to the government, and to the particular revenue officers whose acts are in question. Returns were made of the interest due and paid on the certificates, plainly referring to them; assessments made, and taxes paid on the interest. In view of this fact, it is not easy to see how the fifteen-month provision could apply to the case at all. The language of the act in this respect (sec. 20) is: "And in case it shall be *ascertained* that the annual list, or any other list which may have been, which or shall hereafter be, delivered to any collector, *is imperfect or incomplete in consequence of any omission, etc.,*" within fifteen months after the delivery, he may proceed,

etc. It would be difficult to maintain that this issue of certificates was not known until March, 1870, or was "ascertained" afterward. It is immaterial to us, however, whether they say it was or was not known. If they acted under the twentieth section, so be it. If they acted under the fourteenth section, so be it. They were all the time pursuing The New York Central Railroad Company for a default, and the statute says that when default occurs the proceedings shall be in a way pointed out. Such provisions of the statute were deemed, by those who enacted them, not only wise and suitable, but exacted by the principles of justice, and by the letter of the Constitution itself. They are parts of one of the most arbitrary statutes ever enacted by Congress, even in the emergency of war. The history of the country has no parallel in legislation, to the statute we now consider, in nearness of approach to the verge of constitutional power in some respects. To be defended, it must be preserved from perversion, and must not be stretched by lax construction; it is justifiable by reason of its safeguards and mitigations. Without these, it would be tyrannous, and destructive of the fundamental principles of the Constitution. To qualify the summary and rigorous exertions of power it permits, are the provisions to which attention has been called, allowing the alleged delinquent to be heard. These rights to a citizen, before taking his property or inflicting penalties upon him—permitting him to call witnesses, allowing him to produce books, and giving him a hearing—were the most stinted measures Congress dared dole out in satisfaction of the command of the Constitution, that property shall not be taken without "due process of law." We complain in this case that even the poor pittance of "process of law," given by such provisions, was denied to us. We say that every purpose for which they were enacted has been violated.

The plaintiff could not restrain the defendant by in-

junction. A section of the statute expressly forbids such a proceeding. The plaintiff could not arrest the doings of the defendant—there was no course but submission. The United States, dispensing with all its statutory modes, could bring suit for the tax, and thus, in a forum, higher and safer than the assessor's office, both sides could have a day in court, and a full judicial examination. This has been insisted on in vain, from the beginning. The revenue officers have insisted upon the statutory remedies; and, having insisted on the statute, they must observe the statute—they must proceed according to the statute. The law commits an assessment to the judgment, discretion, and conscience of the assessor, and the illegality of this assessment is more gross when it turns out that the assessor here was the mere machine, the mere ministerial agent and messenger of a supervisor of internal revenue, who had no more power to make an assessment than the general of the army. The assessor and his assistant were the officers to assess, and not the supervisor. But upon an order or command from the supervisor, the assessor sat down alone in his office, without any summons to anybody, without a book or a paper, an account or a witness, without going on the premises of the alleged person in default, without a particle of evidence before him, and wrote a paper, which paper we understand to be not a list or roll, and which he handed the next morning to the collector. What was the foundation of that paper? Was it the product of a *quasi* judicial act? Was it a judgment rendered in a proceeding? Was it the exercise of the discretion or judgment of the assessor? Was it a satisfaction of the statute? He says he found a public document, apparently printed by the legislature, in which he saw an item of $23,036,000, and he transcribed that item from the document upon his paper, and handed it to the collector; and that is termed an assessment. He says he never made any other assessment; he never changed that paper; he never, as an assessor, did any

other act; he said he had done another act afterwards, that he had acted as commissioner or arbitrator, but he did not act then as assessor; and if anything was needed to bring out into bold relief the violation of a statute which commits the act of assessment to the judgment and conscience of the assessor, and requires that he shall act upon evidence, examination, and inquiry, it is to be found in the proof that this assessor, at the behest of another, wrote down a statement as if expressing his judgment that a liability to tax upon $23,036,000 existed, and then afterwards, when emancipated and put upon his judgment and conscience by being selected as an arbitrator or referee by the Secretary of the Treasury, he signed a report in which he finds upon his judgment and his conscience, as an officer and a man, that no such liability whatever existed, and that the law nowhere includes the certificates in question among objects of taxation.

Reference is here made to the case of The Dollar Savings Bank to show, among other things, that though the state or the king may sue without assessment or statutory proceeding, the assessor and collector when they act must keep within the statute strictly. The action, the court will remember, was a suit brought directly by the United States against the taxpayer, an action of debt for the tax due by law, without reference to return or assessment, or any act of the revenue officers.

The court says: "The act also declares that, in case of any default in making or rendering such list or return, or any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of the law in all other cases of neglect and refusal." * * "The second error assigned is, that the circuit court erred in holding that an action of debt is maintainable in that court for the recovery of taxes."

The party took the ground that it must be by assessment, that there was no other way of doing it; and that the assessment must be, as we say it must be here, to be a valid assessment. The court proceeds:

"What those general provisions of law are may be seen in other sections of the act which prescribed assessments, delivery thereof to the collectors, and distraint if necessary. It must also be conceded to be a rule of the common law in England, as it is in Pennsylvania and many of the other states, *that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies.* But it is important to notice upon what the rule is founded. *The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies, and it is enforced, when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other.* But by the internal revenue laws the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either expressed or implied, contained in the enactment of 1866, are for others; not for the government. *They may be obligatory upon tax collectors, they may prevent any suit at law by such officers or agents,* but they are not rules for the conduct of the state. 'It is a familiar principle that the king is not bound by any act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised, for example, any person or persons, bodies politic or corporate, affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. * * * It may be considered as settled, that so much of the royal prerogative as belongs to the king is in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution.'"

[Authorities are here cited, and the opinion proceeds:]

"It must, then, be concluded that the government is not prohibited by anything contained in the act of 1866

from employing any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason."

The distinction here made is our distinction. In an action of debt, proceeding at common law, and upon the act of Congress giving the action, the government may sue without assessment, and, if the bank is proved a debtor, may recover. So the government may sue the defendant in error, and on proof that it is a debtor, may recover. It may be a debtor, but it can be made a *judgment* debtor only by trial, or by some proceeding which the law invests with the attributes of a trial. Are we judgment debtors? Is the defendant in error a judgment debtor? Is the plaintiff an adjudged delinquent? It is, if the statute has been satisfied by the assessor and collector complying with and conforming to it strictly, but not otherwise. The plaintiff in error seeks to treat the defendant here, not as a debtor, but as a judgment debtor, an adjudged delinquent, adjudged either by judicial proceeding or by that substituted *quasi* judicial proceeding which is tantamount to it. The case hinges on the validity of the act of Mr. Lathrop, when he sat down alone, and, ignoring all these provisions of the statute, did what he calls assessing a tax upon one of the corporations of which the plaintiff below was formed. "Due process of law" must be employed. If a suit is brought for a tax, we have a right to answer, we have our day in court. If an assessment is made in the regular way, those who framed the internal revenue act believed it contained sufficient substitute for a trial in court to satisfy the constitutional demand of "due process of law."

I cite also a few lines from the opinion in the case of The United States v. William Hudson, in which Mr. Justice Davis sat with the District Judge of Wisconsin, (14 Int. Rev. Record, 100): "This assessment," says the

court, "was made under the authority conferred upon the assessor by sections 14 and 20 of the act of June 30th, 1864." So was the pretended assessment in the case at bar made under those two sections and under no other, because they are not changed. Again, says the court, "*The defendant was duly notified and summoned before the assessor, and appeared and was examined on oath, and testimony was taken before the assessor, and a full examination had of the case, as provided by law, and after such hearing said assessment was made, and was afterward affirmed, on appeal.*" Such, in that case, were the proceedings deemed necessary; and the court recites the proceedings, to show the claims of the assessment to validity. Yet it was insisted in the court below in the case at bar that the validity of an assessment in no degree depends on such proceedings, or on any proceedings. The objection in the case now cited was that the assessment was void, because it stretched over a subject-matter to which the 14th and 20th sections did not apply. What does the court say?

"The proceedings of the assessor, in making the assessment *conform substantially with the requirements of the act.*"

"The proceedings of the assessor in making the assessment conform substantially with the requirements of the act; but the defendants claim that the sections above mentioned, under which the assessor acted, are not applicable to distillers, and that he had no jurisdiction in the premises, and that the assessment is, therefore, void."

Again, (speaking of the nature of the power of the assessor,) "The authority confided to him by the sections above named *is in its nature judicial*, instead of ministerial." This is our argument. The assessor cannot, we insist, legally exert his authority by sitting down alone as a mute, unthinking, involuntary scribe, and doing the will of Mr. Supervisor O'Donnell; the authority is not menial or ministerial, but it is the same function which

your honors, in a higher forum, now exercise. It is judicial, says the court, and not ministerial. Again, the court says, speaking of these sections regulating assessment, "they not only provide for collecting the revenue, *but also furnish a mode of redress to the party who suffers injury by their administration.*"

Somewhere and sometime before his property is taken away, every creature under the protection of the Constitution, be he traitor, parricide, or corporation, has a right to be heard. That right we say has been denied to us; and I say this not only under the point denying the regularity of the assessment in itself, but also under the objection that the assessment was made in form and in fact, be it sufficient or not in itself, against a dead person, a corporation which for four months and more had had no existence, and could not speak.

I submit that this assessor, acting under a statute as a statutory officer, had no more right to do what he did, and as he did it, than your honors have to go into the fields and with your own hands execute original justice upon men and things.

Second.

The so-called assessment was against The New York Central Railroad Company. It was made on the 3d of March, 1870. On the 1st of November, 1869, The New York Central Railroad Company ceased to exist. It then became extinct, in law and in fact. It was dead; it could not speak or act. It could not sue or be sued. An assessment against it, was an assessment against a dead man. No lien could come from such an assessment; nothing could come from it; it was absolutely void. Nothing, however, was lost to the United States by the death of The New York Central Railroad Company. If, during its lifetime, it became liable to pay a tax, that "*liability*" lived after the debtor's death. The statute kept it alive and held the new corporation amenable to it. The statute of New

York preserved such a debt if it existed, but ascribed it to the new corporation. And here the attention of the court is asked to two or three features of the statute—the act of consolidation under which the plaintiff below was created, and The New York Central Railroad Company ceased to be.—(Record, p. 41, *et seq.*) I refer to two or three sections before coming to the one most important, in order to show the court that an *additional* corporation was not created, leaving the Central Company standing, but that it was the absolute obliteration, the extinction of the New York Central Railroad Company, and the erection of a new corporation. There was no coeval existence. The birth of one was the death of the other. They never existed simultaneously for one moment.

This act provides that it shall be lawful for any railroad company, or any other corporation, organized, etc., "*to merge and consolidate its capital stock, franchises, and property* with the capital stock, franchises, and property of any other railroad company or companies."

The first four sections clearly express the purpose of working the extinguishment of the then existing corporations which may be brought under the operation of the act, and of erecting new and distinct corporations. "The *new* corporation" is constantly referred to. The name of the "new corporation" is to be stated in the articles by which its creation is evidenced; the number and names of directors is to appear, and so on; the manner of converting the capital stock of each of the outgoing companies into that of the "new corporation" is declared, and other like particulars are given.

Section 4 deserves careful notice. It completely divests the corporations merged, of all rights of property, and invests the new corporation with them.

"Upon the consummation of said act of consolidation, as aforesaid, all and singular the rights, privileges, exemptions, and franchises of each of said corporations,

parties to the same, *and all property, real, personal, and mixed, and all debts due on whatever account to either of said corporations, as well as the stock, subscriptions, and other things in action belonging to either of said corporations shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed.*"

Section 5 preserves liens and gives creditors the right to sue the new corporation on "liabilities" previously incurred.

"The rights of all creditors of and all liens upon the property of either of said corporations, parties to said agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, *and all debts and all liabilities* incurred by either of said corporations, except mortgages, shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said *debts or liabilities* had been incurred or contracted by it."

The court will observe that in the latter clause mortgages are alone excepted. All debts and liabilities are to be prosecuted against the new corporation. It is noticeable that the word "*liens*" is dropped in this clause. The section goes on to declare that "no suit, action, or other proceedings now pending before any court or tribunal, in which either of said railroad companies are parties, shall be deemed to have abated, or to have been discontinued, by the agreement or act of consolidation as aforesaid, but the same may be conducted," etc. But for these last words, even pending suits in court would have abated and been swept away. So broad is the general effect of the statute that a special reservation was deemed necessary to save existing judicial proceedings.

The effect of this statute and the consolidations under it have often been considered. The bar and the bench of New York have never supposed that the service of process on the New York Central Company after November 1, 1869, was of any effect whatever. Process was so served for a time in ignorance or inadvertence, but no

defence was made, no attention was paid to it, and no fruit ever came of it.

The Court of Appeals of New York construed the act of consolidation in this regard in Prouty v. Mich. S. & N. Ind. R. R. Co., 52 N. Y. Reps., 52.

The headnote is as follows: "Where two or more railroad companies are consolidated, as far as the creditors of one of the original companies are concerned, the consolidated company is the successor of the old company, but in respect to the properties of the other company it is a new and independent company, and such creditors have no claim against it upon their original contracts, but only by virtue of the assumption of the obligations of the old company."

Again: "That a subsequent order substituting the consolidated company and its officers as defendants was error, as it made them liable upon the original contracts, and subjected them, and all the funds and property of the consolidated company, to *the restraints adjudged against said old company.*"

The opinion thus closes: "But however clearly it may appear that the plaintiff and those in whose behalf the action purports to be brought are entitled to such a remedy, it can legally be obtained only in an action against the parties named, that is, the new company, founded upon their assumption of the liabilities of the other, and not by the summary process of a motion to insert their names as defendants, and then apply," etc.

It is difficult to argue against the notion that a legal proceeding may be maintained against a corporation, as such, after it is dead.

A dead man may have executors or administrators; if he has none, and suit is to be brought, the law provides the mode of setting up a legal representative. But when a corporation dies, it has no board of directors, or agents. There is no authority to speak or act for it, or to employ an attorney to speak or act for it. All this is true if the

corporation be simply extinguished; is it not more manifest when the law creates and names a corporation to take its place, and to be liable and responsible in every case in which the defunct corporation was liable in its lifetime?

Stress was laid at the circuit on the words of the consolidation act, "and the respective corporations shall be deemed to continue in existence to preserve the same." What is "preserved" by these words? "The rights of creditors," where they exist; and also "liens," where they exist. Certainly the words do not create a lien, and do not transfer or transplant a lien from the property of one to the property of another.

To make them answer the purpose of the plaintiff in error they must be held to so work that if a car-builder had built cars for the old Central Company, and had a mechanic's lien before the consolidation, he could spread his lien over all the cars and property of the new corporation three years afterward.

Third.

But if a dead corporation be suable, and assessable, still the distraint in this case was illegal. The seizure was of the property of the defendant in error, on an assessment against another person. It was the seizure of the goods of one man on a judgment and execution against somebody else. Suppose the assessment was good against the old corporation; suppose the New York Central Railroad Company was alive when it was assessed; suppose the assessment perfect in all regards. Then the case is the seizure of the goods of one man on a judgment and execution against another. The counsel below argued that if a lien on the property of the New York Central Railroad Company be established, that lien survived by virtue of the statute of New York. I admit that. I insist upon it. But before going to that, is it not true that on an assessment against one person, seizures were

made of the property of another? The "liability" to pay the tax, if the law ever imposed it, of course survived all the time, and attached to the new company as a "liability." If the New York Central Railroad Company was liable to a tax, or if it had cast one of your honors from an embankment and injured you, if it owed any other "liability," this statute of New York took up that liability where it found it, and fastened it upon and against the new company. There is no doubt of that; and so, the United States could sue for taxes. We are now speaking of a lien, not a liability. The only assessment was against the New York Central Railroad Company—no alternative, no new corporation. The New York Central Railroad Company existed from May, 1853, down to November 1st, 1869, and from that time on the new company was in existence. In March, afterwards—in March, 1870—this paper was made, and it is the only assessment pretended.

"United States Internal Revenue Assessment against The New York Central Railroad Company. The New York Central Railroad Company having failed to make returns of the scrip dividend or interest certificates voted at a meeting of the directors of said company, held on the 19th of December, 1868, as required by section 122 of the internal revenue law; now, therefore, by the authority vested in me, and as required by the several sections of the internal revenue laws, I do assess against the president, directors, and company of the New York Central Railroad Company the following tax, to wit: Signed, Ralph P. Lathrop, Assessor." (Record, p. 46.)

If that be an assessment, be it regular or irregular, good or bad, it is leveled at The New York Central Railroad Company alone; and no notice ever reached the defendant in error that there had been an assessment until February 26th, 1872.

On this so-called assessment three warrants were issued—two against the old or new company in the alternative, and a third against the new company alone.

On an assessment against The New York Central Railroad Company, a warrant issued, which does not refer to The New York Central Railroad Company at all, except to recite an assessment against that company, and it directs the person deputized to go and collect it of another corporation. This he proceeded to do. It was on that particular warrant that he made $446,000, and all this on a void assessment, even if in due form, but without form or substance, and confessed now, on its own theory, to have been false by more than a million dollars. Such a seizure of the property of the new company, would have been illegal, even if the defendant, or the United States, had acquired a lien, no matter when, against the property of The New York Central Railroad Company. The statute of New York preserves existing liens. What is a lien? What is its scope and efficacy? A lien is specific, whether it rests on real or personal property. It exists *in rem;* it binds property. What property? It affects the property to which it attaches in the beginning; no more. A lien does not swell or move about; it does not travel over property save that which by its terms it covers. It may attach to all the property of him against whose property it exists, and attach afresh to his property as fast as he acquires it. But a lien never spreads over the property of third persons—property never belonging to him whose act or debt, or deed, created or suffered the lien. A mortgage is a lien, whether it covers lands or chattels. Did anybody ever hear that by virtue of a mortgage you may take lands or chattels upon which it did not rest, to which it did not fasten in the beginning? Take a legacy charged on a piece of real estate. Did anybody ever hear that you could charge it on another piece of real estate, or that a lien, or servitude—a covenant running with the land, anything attaching specially to the real estate or personal property, could be dissevered from that, and transferred or transplanted or spread over anything else? If a lien

on the property of The New York Central Railroad Company existed, it could be enforced against that property. The creation of the new corporation and the death of the old one did not affect it one way or the other. Still it could be enforced against the property covered by it, just as if the New York Central Railroad Company were yet alive. In other words, the act of the legislature left it in *statu quo*. If a lien had fallen on the property of The New York Central Railroad Company, there it lay, before and after the statute and consolidation alike. But the defendant, asserting a lien upon the property owned by The New York Central Railroad Company in March, 1870, by virtue of that lien, in 1873, seized indiscriminately the property of the defendant in error, and threatened by yet broader seizures to arrest its whole business. There is no pretence, there could be none, for the truth would not permit it,—there is no pretence in the pleadings or in the evidence that the property of the plaintiff seized in 1873, was in 1870 the property of The New York Central Railroad Company, or even in existence at the time. Philosophers tell us that matter is indestructible. This matter may have existed somewhere as matter in some form, but the cars and engines seized were not even cars and engines when the lien attached. They were not *in esse* then, and much less the property of The New York Central Railroad Company.

We might, I submit, waive the assessment and all its defects and illegalities. We might assume that the collector could enforce the tax without assessor or assessment. We might even say that, by operation of law, a lien attached the moment default was made, and that default was made by The New York Central Railroad Company, and still the seizure of the property of the plaintiff was a bald, naked trespass. Waive the death of the Central Company; waive the irregularity and illegality of the assessment; waive the fact that no default has been shown against the Central road, or lia-

bility to tax, as we believe; concede all these points; concede that a valid lien was fastened upon the property and all the property of The New York Central Railroad Company on the 3d of March, 1870, and that all property to which that company afterwards obtained title fell a prey to the pre-existing lien; and then, by what authority is it that the owner or holder of that lien comes by virtue of it and snatches property which had no existence when the lien was created, which belongs to a third person, and which never belonged to him against whom the lien existed? I cannot think, had this been a claim for a small tax, had the party been a man or a woman, not a corporation, it would ever have entered into the mind of man to pile up, one upon another, proceedings such as these. I cannot believe that this assessment, void by the statute, because it departed from it, made as it was against a dead corporation, made the pretext for seizing property belonging to another corporation, and finally of seizing property which never did belong to The New York Central Railroad Company at any time,—I cannot believe that a proceeding in which these are incidents, can stand before this court.

Fourth.

Dismissing all preliminary objections the certificates were not liable to the tax sought to be imposed on them.

The revenue acts contain no provision subjecting these vouchers to the income tax, except in respect of the interest they bore; and on this the tax was regularly and periodically paid and accepted without objection and as satisfaction of the law. *The certificates themselves*, bodily, are nowhere described or included among the incomes whereon a tax is payable.

The case cannot fall within the first enumeration of section 122. That is as follows: "That any railroad, canal, turnpike, canal navigation or slack-water company,

indebted for any money for which bonds or other evidence of indebtedness have been issued, *payable in one or more years after date*, upon which interest is stipulated to be paid, or coupons representing the interest," * * * * "shall be subject to and pay," etc.

This description, even without its subsequent qualification, is plainly of evidences of debt, *payable absolutely* and at *a fixed time*. In short, it means bonds.

The provisions of the same section as to the right of the company to deduct the tax, in making payments to the holders of the evidences of debt, and as to making "lists or returns," put this beyond all doubt. Deductions are to take place, and lists are to be made, in respect only of evidences of debt, *due and payable, and when due and payable*.

The certificates in question lack nearly every characteristic required by this language, and nothing has been claimed under this clause of the section.

The section proceeds, "or any such company that may have declared any *dividend*, in scrip or money, *due or payable to its stockholders*, including non-residents, whether citizens or aliens, *as part of the earnings, profits, income, or gains* of such company."

To fall within this description the certificates must be,

1st, "*a dividend.*"

2d, a dividend "*due or payable*"—due or payable at some time fixed or determinable.

3d, a dividend of *part of the earnings, profits, income, or gains of the company.*

4th, a dividend of earnings, profits, income, or gains, *acquired within the year preceding the assessment, or at least a dividend falling within the year.*

What is a dividend? Is it not a division? Is not something divided, and divided at the time? Can it be a mere agreement to divide in future, contingently and conditionally, or even positively? To make a dividend, must

not a corporation part with something it has, and must not the stockholder get something he had not before?

A dividend is exactly the reverse of an assessment on stock. In the case of an assessment on stock by a corporation upon the stockholders, something which before belonged to the stockholders in severalty, passes over to the corporation as a whole. In the case of the declaration of a dividend by a corporation, something before belonging to the corporation as a whole, passes over by distribution to the stockholders in severalty. Must not a debt be created by the declaration of a dividend—a debt which the law can enforce? If one of your honors be a stockholder in a corporation, and a dividend is declared, you can at once maintain assumpsit for your portion of it.

Bouvier says, "The term is usually applied to the division of the profits arising out of bank or other stocks, or to the division among the creditors of the effects of an insolvent estate."

The statute prescribes tests and limitations of the kind and nature of the dividends to be taxed; but without resort to these limitations, the certificates in question were not a dividend.

The court cannot deal with the motive which may have prompted the issue of these acknowledgments of the interests of stockholders in corporate property. If the motive was to buoy the stock—if it was, as has been charged, to make broader the basis on which interest or dividends might be paid, and thus to keep below the maximum of profits allowed by the charter; if it was designed as an apology for keeping up rates of freight and travel; if it was to appease dissatisfied or uneasy stockholders; if it was to furnish current and tangible evidence of ownership, which would pass in market, or which could be pledged or handled by borrowers or speculators—still, the certificates must be taken, here, in their legal reality, as their makers made them.

The assessment was upon the certificates, not upon the fruits, the prosperity, the increase, or the receipts of the corporation.

Even if the motive was to avoid all acts and proceedings which the revenue laws could lay hold of, still the question is the same—a gift, *inter vivos*, may be made to avoid a legacy tax; a verbal agreement may be made to avoid a stamp duty on a written instrument—but in either case, the tax no more attaches than if the parties never thought of it.

Not what did the parties aim at, not what object or evasion was in view, not what would the actual condition of the corporation have enabled the directors to do, *but did they declare a taxable dividend?* is the sole question at this point.

There was in law and in fact nothing to divide. Mr. Worcester, an unimpeached and uncontradicted witness, giving the only testimony on the subject, proves that when the certificates were issued there were no moneys belonging to the company on which they were based, or with which they could be paid.

There was no power to create or divide stock—all the stock had been divided before.

It cannot be argued that the corporation had at the time divisible property to answer the certificates.

No *debt* was created. There is no room to suppose that the idea or semblance of a debt entered into the transaction, because a debt or obligation might have robbed the shareholders, by absorbing the future moneys and earnings of the company, and by taking precedence of the stock—such a debt would, indeed, have imperiled the stockholder's possession of the road itself.

That these certificates, or rather that certificates more efficacious than these, created no debt or obligation, was decided in the cases of The Sun Insurance Company v. Mayor of N. Y., 4 Seld., 241; Mutual Ins. Co. of Buffalo v. Erie County, 4 Com., 442; People ex rel., etc., v. County of New York, 16 N. Y. Reps., 424.

These cases in their application to the case at bar are alike; they decide the same point, and to that point I ask attention.

The Sun Insurance Company (like the plaintiffs in each of the two other cases) was a *mutual* company. Its capital consisted of the premiums paid by the persons insured. Every person paying a premium became a member. Premiums paid could never be withdrawn from the company, but *during its existence* were liable for all losses and expenses.

By the ninth section of the charter, the officers were empowered every year to estimate, "as near as may be," the profits of the preceding year, deducting losses and expenses. They were then to *credit, on the books, each person who had paid premiums with his proportion of the profits, and to issue to him a certificate declaring him entitled to a portion of the invested funds of the said company equal to the amount so credited to him, and also to the receipt annually, out of the interest or income derived by said company from the investment of said profits, of an interest not exceeding six per cent. per annum; which certificate shall contain a proviso that the amount named therein is liable for any future loss by said company.* Section 11 provided that when the profits exceeded half a million dollars, *the excess might be applied to the redemption of the certificates, year by year*, each year's certificates to be redeemed in their order. A supplemental act allowed various investments in state stocks, United States stocks, etc., and *authorized the company to divide the interest on investments among the holders of the certificates.* In 1850 the "net profits" amounted to $1,000,000. On this *the company* were assessed. *The company* filed a bill to restrain the collection. The argument was that this capital was *not capital.* Gardiner, justice, delivered the opinion of the court. He says:

"This fund, though permanent, and liable for all losses and expenses of the corporation during the continuance of its charter, is not, it is said, capital, because it was not

constituted with a view to profit, but as the price of indemnity; capital, we are told, being money invested in business with a view to profit. The whole argument rested on this assumption.

"*These accumulations became capital, and liable for all debts of the corporation. It is said that the profits declared at the end of each year, in pursuance of the act, became the property of the stockholders respectively. We do not so understand the statute.*

"The credit on the books of the company and the certificates issued to its members merely designate the interest of the respective stockholders in the corporate funds. *No* property passes, *and no right to the specific sum of money, and no debt against the company is created.* * *

"They entitle the stockholder to receive an amount of the dividends, *when made*, in proportion to the amount paid in or secured. But in the meantime the whole fund in corporations of this description, like the capital in the other class of institutions, continues liable for their debts, so that the proportional residuum only, after deducting the losses and expenses of the corporation, *is represented by the certificates in either case.*"

From this case three things are manifest: First, the certificates there were based on and represented money *actually in existence and in hand.* Second, this money was *capital*, and so taxable. Third, the certificates were held by the court to carry no ownership of any part of the capital to the holder, *not to constitute any debt against the company*, and not to be taxable. It is not said in so many words that the certificates were not taxable; but I need not remind your honors that if the certificates were themselves taxable, the capital which they represented could not be taxable also—the same money could not be twice taxable.

It is to be especially observed, too, that the certificates there were payable out of funds actually existing, and in hand as money and capital of the corporation by which the certificates were issued.

I beg the court to observe the distinctions, and also the similitudes, between the case at bar and the case there

decided. There the certificates were based on a fund in hand, an invested fund. They were payable absolutely, when the time came, from that fund. Whenever the corporation wound up, its whole assets and moneys belonged absolutely to the holders of the certificates, and to nobody else. The capital consisted of the premiums paid in, and the certificates were based upon and payable out of these paid-in premiums.

Am I mistaken in supposing that, in grounds for argument, that the certificates constituted "a dividend," the case before the court in that instance was essentially stronger than this? There the division, or payment when the time came, was to be of moneys *in esse* when the certificates were issued. Here the division, should payment ever be made, is to be of moneys *in fieri*. There the division was to be absolute, and could be enforced by law. There the obligation was certain in law. No uncertainty attended it, save an uncertainty of trade. The money was subject to one contingency, and only one, and that contingency attaches to every penny of capital employed in business, whether corporate or individual, namely, the vicissitudes and hazards of the enterprise in which it is embarked.

Melted down, the decision is this: "The money behind the certificates is the capital of the corporation, and by the laws of New York such a corporation is taxable on its capital, but the certificates create neither dividend nor debt."

The brief filed by the plaintiff in error insists that the certificates in question are essentially and ultimately like scrip for stock. Interest, it is said, is or may be payable on both; no time time is fixed for the payment of the principal of either; then why are they not alike?

The answer is this: The stock represents capital—it represents principal. It has absolute and ultimate force and value between the corporation and the holder. Each share of stock is the title to an aliquot part of the assets and property of the corporation. Whenever the corpo-

ration is wound up the assets belong absolutely and wholly to the stockholders; and while the corporation continues the stockholders govern and own it. Not so with the certificates and their holders. While the corporation lives the holders of certificates do not vote, or govern or own it. They have no claim on it in any event, except for interest on their certificates, if interest is in future earned, and even that is contingent. And when the corporation dies, they have no claim on it for a penny, and no ownership or interest in its assets at any time. If a stockholder owns also a certificate, he does not, at the dissolution, receive a cent for his certificate, nor a cent more than he would have done had the certificates never been issued. If one not a stockholder becomes owner of a certificate, he acquires no ownership in the capital or assets during the life or at the death of the corporation. Stock is capital and value—certificates are not. Stock is a debt in law—certificates are not. Such is the difference between the two things. The comparison is a test of the nature of the certificates, and the court sees that of principal the certificates have none; of ownership in the corporation there is none; of obligation binding the corporation there is none; they are the contingent promise of a shadowy by-and-by.

Something radically different from all this is necessary to constitute a "dividend in scrip." To be a "dividend in scrip" the certificates must be both a dividend and a debt; because the essence of scrip is the debt of which it is the evidence, upon which the party may proceed at law, or file his bill to wind up and dissolve the corporation and distribute its assets *pro rata* among those who own the stock. This is the function and nature of scrip, and hence a "dividend in scrip" must be some act and thing which makes a dividend and also creates a debt.

In the case at bar, what did the stockholder receive that he had not before? The express acknowledgment of the certificate is that he had something before, and he

is thereby furnished evidence of it—nothing more. Can he maintain any right by reason of the paper which he could not maintain without it? It is the admission of a fact which might be easier proved by the admission than without it; but, when proved, is the stockholder any better off in the one case than in the other? What does he gain in time, opportunity, or amount?

By accepting the paper he may lose something—he may tie his hands by postponing his claim to the "*option of the company*," and agreeing to look for payment to "*future earnings*," and to take stock at par in lieu of money, "*at the pleasure of the company*."

But, in the view most favorable to him, how does he gain, except as a creditor gains by presenting a book account and getting it admitted to save proof of items?

Suppose the company had given an agreement in form of a promissory note, payable at its pleasure, would it be a dividend? Would anything more than interest payments, or *payment* of the principal when in fact made, be taxable as income in such a case?

Dividends are made of estates of bankrupts and dead men; but is a certificate of an assignee or an executor of the existence or validity or amount of a claim, a dividend?

Life insurance companies are accustomed to issue evidences of indebtedness, of a nature having all the attributes of dividends, save that the time when the stockholder can realize the money is uncertain, and even in such cases the act of Congress provides that the income tax shall not attach "until such dividends shall be payable by such companies."

Had the Central Railroad been in the hands of a receiver, and he had certified every fact stated in the certificate here, would it have been a dividend?

The issue of the certificates changed no property and no fact. Suppose they had been sixty per cent. of the nominal capital instead of eighty, would the stockholder

have been poorer? Would he have lost anything, unless by admitting that his interest amounted to only sixty per cent. beyond his nominal stock? Even in this sense he could not lose, because the certificates lessened by their full amount the actual value of the stock. Everything was there before, as much as after, the certificates were issued, and the paper had no force except *as evidence*. An affidavit, if the corporation could depose, would have done as well.

Had money been on hand, and earned during the taxable year, to answer the whole amount of the certificates, whoever accepted such a certificate would have received no dividend, but would have expressly waived and postponed it. The profits, had there been profits, might have been taxable by assessment as such, or by suit for them, if earned within the year, but the certificates, even then, would not have been a dividend of scrip, much less of money. Suppose the treasury of the company had been overflowing with recent earnings—whether the power to tax could have reached them in some other mode, or under some other provision of law and some other assessment, is foreign to the present point; but how could it be said, even in that case, in the face of these certificates, that their issue was a division of such earnings, or the declaration at the time of a dividend? The exact opposite is written on their face.

I here call attention to the case of Brundage, in New York Supreme Court Reports, Vol. I., p. 82.

The very certificates now before the court were before the court there, and one of the questions presented, discussed, and decided, was whether these certificates and their issue constituted a dividend, even in the sense of the general law, either of scrip or money?

The will bequeathed stock in the New York Central Railroad Company, and if the certificates in question were incident to the stock, or a "scrip dividend," they went to one legatee, if not a dividend, they went to

another legatee. The case was decided in the first instance by Mr. Justice James C. Smith, at special term. He says: "Whatever force there may be in the view advanced by the counsel for the defendant, as to the legal character and effect of the certificates, and the power of the company to apply future earnings to their payment, at the expense of the holder of the original stock, those views do not justify the conclusion that the certificates passed by a bequest of the stock. It is true that the character of the certificates is somewhat anomalous. *They are not capital stock, nor are they dividends, strictly speaking, either of cash or of stock.*" *Strictly* speaking! Must not a penal statute, in derogation of common law and common right, speak *strictly*, whenever it is allowed to speak at all? What speaks more strictly than a statute passed during the emergencies of war to take tribute as taxes, summarily, with iron hand, and by proceedings so rigorous that they find no precedent in the previous legislation of the country? Strictly speaking, says the judge, they are not capital, nor are they dividends, either of cash or stock. To be taxable under the assessment here they must be not only dividends of stock, but they must be also something more—they must be "due and payable," and they must be dividends of the "earnings, profits, income, or gains." With these three latter conditions and definitions the judge was not incumbered; but speaking upon the question at large, whether they were dividends at all of money or stock, he said they were not. He continues: "*They purport to represent past earnings of the company which were expended in the construction and equipment of the road, and in the purchase of real estate and other property with a view to the increase of the traffic of the company, and they are issued to stockholders as evidence of such expenditure and of their right to reimbursement at some convenient future period.*" Now observe: "*Yet they create no obligation on the part of the company to pay, even if the future earnings should be sufficient.*"

Is not that full answer to the question here, as far as that court had power to answer it? The case was appealed, and the general term affirmed the decision of the special term. Let me read further: "*Yet they created no obligation on the part of the company to pay, even if the future earnings should be sufficient. They are payable with dividends, at the pleasure of the company, and they are also convertible into capital stock at the option of the company*, the legislature having authorized such conversion since the certificates were issued."

I ask your honors to consider this question: suppose a resolution had been passed that eighty per cent. had, since 1853, been expended on the road, and that when it could be, out of future earnings, it should be made up to the stockholders, and that meanwhile interest ought to be paid; and no certificates had been distributed to stockholders, but they had been notified of the resolution, would that have been a dividend? Did giving each one a copy of the resolution and a voucher, change the nature of the act as it would have been without?

The inquiry comes to that. If the transaction, as I have just supposed it, would not have constituted a dividend, then it must have become a dividend if at all owing to the circumstance that copies of the resolution were printed and distributed, and with it a certificate or voucher attesting its good faith.

But again, the statute speaks only of a dividend "*due or payable.*" Suppose this to be a dividend, was it "due or payable?" In what and when? It was not due or payable in stock, because the law did not permit it, there being no unissued stock; and this is recited on the face of the paper, and it is declared that even if the law shall in future ever permit an issue of stock, *the company reserves the right to issue it or not, just as it pleases.* Surely, then, it was not a dividend *due or payable in scrip.* It was not a dividend due or payable *in money*, because the paper states that *there is no money—that has gone*—gone into the road and its equipment.

In passing, I remind your honors that earnings—I use the language of an authority—"Earnings expended for proper ordinary current expenses, and to preserve the property from depreciation," are not taxable in any form. (New Haven Railroad v. Grant, 9 Blatch., 542.)

The certificates were not a dividend due or payable *in money*, because the paper states that *there is no money—that has gone* into the road, and its equipment—and it is stipulated that no payment is to be made except *with money not yet earned, which may never be earned*, and which, when earned, is to be *paid or not*, at *the option of the company for all time.* No statute has ever invested these certificates with any attribute whatever. In 1869 (Laws of N. Y., Vol. II., p. 2,404) the legislature authorized The New York Central Railroad Company, in its discretion, to issue stock in exchange for them. That is all. No such thing was ever done.

At this point, as well as anywhere, reference may be made to the opinion of the Solicitor of Internal Revenue, for its reasoning. I quote parts of it bearing on the question now before the court (the italics are in most cases my own):

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF INTERNAL REVENUE,
WASHINGTON, *February* 28, 1871.

SIR—I have been requested by you to give my opinion as to the validity of an internal revenue tax, assessed against The New York Central Railroad Company, on what is alleged to have been a scrip dividend. * * * *

The facts are as follows: (Here follow the resolution, certificate, etc.)

In May, 1869, the legislature of New York legalized the issuing of these certificates, and authorized their conversion into stock of the company, but no such conversion has ever been made.

The capital stock of the company, at the time these resolutions were adopted, was $28,795,000, and for eighty per cent. of the same, being $23,036,000, interest certificates, in the form above described, were issued.

The railroad company did not then have on hand, undisposed of, or otherwise, this sum of $23,036,000, nor did it then have on hand any other sum or fund which it intended or undertook to divide or distribute among its stockholders.

It appears, from the evidence in the case, that this railroad had been constructed prior to the year 1853, and that, from that time up to the issuing of these interest certificates, there had been a large advance in the value of the property owned by the company, consisting of real estate and other property; that a portion of this increase arose from the general enhancement of values created by the war, and the general progress of the country, and a portion of it from improvements made by the company out of its earnings, such as double tracks, depot grounds and buildings, exchange of iron for steel rails, real estate purchased, etc., etc.

It is claimed by the company that their interest certificates were intended to represent this increase of value only, and that they did not represent any portion of the earnings of the company after July 1, 1862, the time when the internal revenue law took effect.

In my opinion they were intended to represent and did represent the increased value of the property of the company, derived from *all sources*, including the earnings which accrued after July 1st, 1862, and had been applied on the road, as well as those which had accrued prior to that date.

On the 3d day of March, 1870, the assessor of internal revenue of the Fourteenth District of the State of New York made an assessment against this railroad company, founded on these interest certificates, and treating them as a *scrip dividend*.

This was an assessment of five per cent. on $23,036,000, making a tax of $1,151,800. He added, as penalty for failing to make return under section 122, $1,000. The entire assessment was $1,152,800.

It is the validity of this assessment that is now under consideration. Did the law authorize it? It is very clear that there was error in assessing the penalty of $1,000. That is not an assessable penalty, but one that can only be recovered by some appropriate suit or proceeding. This portion, however, is so small in comparison with the remainder of the tax, as to sink into absolute insignificance.

The great question is as to the tax of $1,151,800. Was it in accordance with law?

If it were, it should be collected without hesitation or delay.

If it were not, it should not be enforced, no matter what may be the clamor or complaint of those not familiar with its merits.

The fact that the appellant is a wealthy railroad company, and, perhaps, a gigantic monopoly, should have no influence in the consideration of this question, It is entitled to the same consideration that an individual would be.

The only authority for this tax is found in section 122 of the act of June 30, 1864, as amended July 13, 1866.

That section is in these words: (Here follows the section.)

It is very apparent that this case does not come under the first clause of this section, relating to interest or coupons. If included at all it must be under the clause that "any such (railroad) company that may have declared any dividend in *scrip or money* due or papable to its stockholders, * * * as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to, and pay a tax of five per centum on the amount of all such dividends or profits."

It is not "profits of such company carried to the account of any fund or used for construction."

It is not a dividend in "money." If anything it must be a "dividend in scrip." What is a "dividend in scrip?"

A dividend, in its ordinary signification, is a sum divided. Generally a sum of money that has been divided among certain parties. A "dividend in scrip," as used in this statute, is the setting apart of some portion of the "earnings, profits, income, or gains" of such company among its stockholders, and giving them a written certificate or evidence of such setting apart, and promising them, at some time, to make payment of such sum.

The time when payment shall be made is not material, *provided there is an absolute promise to pay.*

The scrip, the writing, must impose upon the company the liability to pay, and give to the stockholder the right, at some period, to enforce the payment.

It must be such an instrument as would be the foundation of an action against the company in case it refuses to pay.

And I think it must be a promise to pay in money. The terms used plainly imply that money is the thing to be paid. The language is: "And said companies are hereby authorized to deduct and withhold, from all payments on account of any dividends due and payable as aforesaid, the tax of five per centum."

"And the *payment* of the amount of said tax so deducted from the dividends, and certified by the president or treasurer of said company, shall discharge said company from that *amount* of the dividend, except where said companies may have contracted otherwise."

I have said that the scrip must be an absolute promise to pay. This is implied in the language employed. It does not even require a return of the dividend until the tenth day of the month following that in which the dividend *becomes due* and *payable.* "And a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which said interest, coupons, or dividends *become due and payable.*"

In the case at bar, when do these dividends become *due and payable?* "At the pleasure of the company out of its future earnings." "At the option of the company out of its future earnings."

Non constat that it ever will be the "pleasure of the company," "the option of the company," to make payment. Perhaps I might say, *non constat* that there ever will be earnings sufficient to pay them. It is possible, although not probable, that there may be so many accidents and casualties connected with the road as to absorb all the net earnings.

The company have imposed no absolute liability upon themselves, except to pay *dividends* on their certificates at the same time, and at the same rates, that they do upon the capital stock.

They do not bind themselves even to declare any dividends on their capital stock. They have the legal power to absorb all the earnings of the road in laying another track, and in improving their own road, or perhaps in acquiring other roads; and if they should do this in good faith, the holders of these interest certificates cannot complain.

They have no power to compel the company at any time to make payment.

It may be said that this company have adopted this form of certificate for the very purpose of avoiding liability to the tax. If they have done it, even for that purpose, and the law does not impose a tax upon the transaction, as they have made it, there is no power to impose it. A party may make a verbal contract, instead of a written one, for the sole purpose of avoiding stamp duty on the writing, and yet I do not suppose that he thereby becomes liable to any stamp duty. * * *

It has paid tax at five per cent. upon all dividends received on these interest certificates. These dividends were four in number, and at four per cent. * * *

I have the honor to be, very respectfully,

(Signed) WALTER H. SMITH, *Solicitor.*

Hon. A. PLEASANTON, *Commissioner.*

I think worthy of mention, also, the report upon this matter written by William Orton, once a Commissioner of Internal Revenue, and signed by himself and his two co-commissioners. It appears in full in the record; I extract a small portion of it.

"The tax on dividends is a part of the scheme for raising revenue from incomes, and, in the case of persons, provision is made for deducting the dividends received from corporations which are required to pay the tax thereon. The rules governing the construction of the law in one case are applicable substantially to the other. In the individual case the question is, what gain or profit has been received or is receivable, and in that of a corporation, what has been *divided or is divisible?* The certificates under consideration amounted nominally to more than $23,000,000, while the excess of revenue over expenses and and dividends from 1862 to 1868 was less than $4,000,000."

"By the terms of the certificates they were payable only at the 'pleasure of the company,' and out of its future earnings. They did not profess to be, and were not, in fact, substitutes for any 'part of the earnings, profits, incomes, or gains' of the company, which had theretofore accrued. They may rightly be styled the certified opinions *of the directors, touching the probable results of their management of the property, put in convenient form for discount and sale.*" * * * *

"We conclude, therefore, that the issue of these certificates was in effect an increase of capital based wholly on a prospective increase of revenue, and *not a dividend of or a substitute for accrued profits*, and that whatever the obligation of the company may have been at that time, or may now be, for tax in respect of the undivided profits accruing during the whole or any part of the period from 1862 to 1868, *the distribution of these certificates did not create a liability to tax, and, therefore, that the company was not liable to the assessment from which it has appealed.*"

I need not beg the attention of the court to the clear statement of Judge Wallace, (Record, pp. 71 to 76, especially pp. 74, 75, 76,) ably declaring and illustrating, as we think it does, the law of the case.

Again, the act of Congress deals in this clause only with dividends declared "*as part of the earnings, profits, income, or gains of such* company." A dividend of property, or of borrowed or unearned money, is not taxable. If this was a dividend, was it a dividend declared "*as part of the earnings, profits, income, or gains of such company?*

The resolution under which the certificates issued speaks of "*earnings hitherto expended,*" but speaks of them only to say that *they are gone*—gone into "construction, equipment, real estate, and other properties, with a view to an increase of its traffic." Were these *earnings* divided? Were the properties bought with these earnings divided? Was any obligation created to withdraw or retire these earnings, or absolutely, even at a future time, to render any equivalent for them? The certificate does not even admit that the stockholder is entitled to *any* reimbursement *now*, but only "*at some convenient future time.*" The only thing stipulated to be paid was interest, or dividends on the certificates, at such rates as future earnings and ability might permit, for certificates and stock alike. In this respect it is not denied that a debt was in one sense created—a debt contingent until paid, but on which, at every payment, the tax act lays hold

and imposes a tax; and on this debt returns were always made and the income tax paid.

Once more, to be taxable, the certificates must be not only a dividend, due or payable, and of earnings, etc., but the fund divided must have been acquired *within the year* for which the tax is levied, or the certificates themselves must, in their origin and in the time when they were to be paid, relate to that year.

Section 117 of the act of 1864 (13 Stat., 281) deducts income, derived from railroad companies, from the taxable *annual* income of individuals; and the language clearly shows that gains *for the year only*, in either case, are to be visited.

This provision is part of the arrangement that corporations are to withhold from their shareholders the tax in gross, and make it over to the collector. This mode of collection is mere mode, as this court has decided. Suppose the stockholder was to receive each his full dividend and pay his own tax, would it be contended in this case either that the certificates were a dividend of earnings of the single year, or that more than the value received within the year could be taxed against the individual?

The next year, March 3, 1865, this section 117 was amended and recast so as to require returns of the income of individuals to include in form everything, whether to be deducted or not, falling within the idea of income or gains, and again we find *the year* made the measure of liability to taxation. Stock, crops, produce of all kinds are to count, "not including any part thereof unsold or on hand during the year next preceding the 31st of December, until the same shall be sold." Again, "and his share of the gains and profits of all companies, whether incorporated or partnership, shall be included in estimating the *annual* gains, profits, or income of any person, whether divided or otherwise.—(13 Stat., 480.) Section 120 (13 Stat., 283), dealing with "undistributed sums" in case of banks, trust companies, and

such other corporations as would usually have such monies, uses this alternative, "undistributed sums," or sums "*made or added during the year* to their surplus or contingent funds."

In the case of railroads, turnpike companies, and the like, it probably did not occur to Congress that instances might arise of accretions or expenditures of long periods being at one time stated in account between corporation and shareholder; but can it be supposed that, in the same scheme of income tax, it was designed in component sections to take tribute of individuals, bank, fire, marine, and life insurance companies year by year only, and of "railroad," "canal," "turnpike," "canal navigation," and "slack-water" companies for all time in a single year?

The only remaining words of the statute which can aid any claim for tax are these—"And all profits of such company carried to the account of any fund, or used for construction, shall be subject," etc.

The obvious answer to any argument founded on this clause of the statute, is that it can have no reference and can give no aid to such an assessment and proceeding as is here complained of. Had the revenue officers proceeded under these words, either by way of exacting penalty for default in making returns or default in paying taxes, or by way of pursuing any fund created from profits, or any profits used for construction, they would at least have raised a question of fact. Such a question is not here. It cannot be contended that the amount of tax exacted would have been warrantable on such a theory; and however this may be, no such assessment was made, and no assessment whatever was made, except only on the *certificates*, treating them as a "dividend."

The Solicitor of Internal Revenue in his opinion dismisses this branch of the statute in a word, as irrelevant and inapplicable.

Here, as well as anywhere, reference may be made to

words of section 122, following all the clauses cited, and governing and restricting them all—"and said companies are hereby authorized to withhold and deduct from all payments on account of any interest or coupons, and dividends, *due and payable* as *aforesaid*, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest or coupons or dividends, and certified by the president and treasurer of said company, shall discharge said company from that amount of the dividend or interest or coupon on the bond or other evidences of their indebtedness so held by any person or party whatever, except where said companies have contracted otherwise." I do not cite this now to touch the question whether the liability of a corporation to tax depends upon whether they do withhold from the stockholder or not. I cite it merely for its description—merely for designation, to show what objects of taxation the statute describes and includes. It must follow from this provision either that a tax is payable only in the cases it applies to, or else that the intention was to exact from corporations taxes which could not be charged to shareholders or deducted from dividends. It will hardly be contended that the preceding clauses of the section are so broad as to lay a tax not payable under the permission and provision thus declared.

How could the right to deduct five per cent. of the face of the certificates be exercised? Is the corporation to advance $1,152,800, or $510,423.60, as the tax, and withhold it when the certificates come finally to be retired? From what fund is the advance to be made? "Future earnings" are the only fund applicable to the certificates. Is interest to run on the advance, doubling every decade?

Let us see where this would lead. If the certificates shall eventually be converted into stock, how is the principal and interest of the advance for taxes to be adjusted? The inquiry seems to bring into strong light the paradox and absurdity of attempting to apply the

122d section to such a transaction. If the certificates continue as long as the corporate existence of the plaintiff continues, or if future earnings are insufficient to meet the certificates in the end, what is to become of the advance? The directors are tied by the fact that these certificates are answerable only out of "future earnings;" the suggestion is that they are to find in some fund or no fund, $1,152,000, being five per cent. of the whole principal, and advance it as a tax, because they can deduct it when they come to pay the certificate holder. But the certificate holder is to be paid in the far future out of future earnings. Interest equals the principal every ten or eleven years; the certificates may run twenty or thirty years, and interest on the tax would meanwhile eat up the whole thing, and thus it would be the case of an advance by directors—by trustees, out of trust funds which they had no right to advance, which had been advanced in violation of the certificates, to be charged with interest, at a future day, against the fund with which the certificates were answerable, unless the company chose to turn them into stock.

Once assume that this tax is to be advanced now, and liquidated in future with interest, and assume that in the end the certificates are exchanged into stock, and we are lost in the mazes of confusion. Manifestly such incongruous consequences are quite beyond the purview of the section. The cases provided for are wholly different, and are confined to profits and payments falling within the taxable year.

An answer remains which alone is fatal to the assessment, if it is rested on this branch of the section. The words "and all profits of such company carried to the account of any fund, or used for construction," first appear in the act of 1864. Preceding acts were wholly wanting in these, and in equivalent words. The six-fifteenth theory is, that from and after the enactment of the income-tax act on which it proceeds, the

liability sets in and continues. This period is assumed to be from 1862 to 1868, six years, and the corporation having, in 1868, existed fifteen years, the result of liability is six-fifteenths of the first assessment. If then the case of the government rests on the provision now in question, it must fall; because till June 30, 1864, there was no such provision, and the six-fifteenths should have been four-fifteenths.

One other feature of section 122 seems decisive of the question whether the issue of the certificates in December, 1868, was a taxable dividend. The section declares that a railroad company "that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, carried to the account of any fund or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest, or coupons, dividends, or profits, *wherever and whenever the same may be payable.*"

It is submitted that these words mean that whenever and wherever a dividend is payable it becomes subject to tax, and that it is not taxable until it is payable. It is still more confidently insisted that the words do not mean that a dividend is taxable not only before it is payable, but whether it is ever payable at all or not. Yet this latter meaning was insisted on at the circuit, and must be maintained in order to bring the transaction in question within the section.

It is enough for me to show that the words at least mean *the same being in law payable at some time.*

The legislative history of these words will vindicate this meaning, if not a still more restrictive significance.

The language, in substance, first appeared in section 81, in the act of July 1, 1862. (12 Statutes at Large, 469.) The words there are, "*whenever the same shall be paid.*" The phrase next appears in section 8, of the act of March

3, 1863. (12 Statutes at Large, 722.) The language is nearly identical, being there first applied to "canal navigation, slack-water, or turnpike companies," they not having been named in the previous acts. The words again are, "*whenever the same shall have been paid.*" The act of March 3, 1863, (12 Stat. at L., 713,) left the words unchanged. In the act of June 30, 1864, (13 Stat. at L., 284,) section 122 was re-written to introduce the words, "and all profits of such company carried to the account of any fund, or used for construction," and to make some other changes not so important. The same words as to payment were used again, except that "paid" is used in the present tense—"whenever the same shall be payable." In the same act, section 120, (page 283,)—and I beg special attention to this—the phrase is employed thus: "That there shall be levied and collected a duty of five per centum on all dividends in scrip or money thereafter declared due, *and whenever the same shall be payable to stockholders, policy-holders, or depositors*, as part of the earnings, income, or gains of any bank, trust company, savings institution," etc.

No doubt or difficulty about the significance of the clause arose, and no change was made, until Chief Justice Chase decided, in November, 1865, that the statute was not broad enough as *to place;* that dividends payable abroad (the plaintiff there being a British subject in Ireland) were not included. To meet this objection, Congress, on the 10th of March, 1866, (14 Stat. at L., 4,) enacted these words, speaking of (section 120) banks, trust companies, etc.: "The words 'all dividends in scrip or money thereafter declared due, whenever the same shall be payable to stockholders, policy-holders, or depositors,' are hereby declared to mean all dividends in scrip or money whenever payable, and all stockholders, policy-holders, or parties whatsoever, including non-residents, whether citizens or aliens. Section 2: "That in section 122 of said act the word 'stockholder' is hereby

declared to mean all persons or parties, whatsoever, that are or may be stockholders, including non-residents, whether citizens or aliens. And the words '*all such interest or coupons, dividends or profits, whenever the same shall be payable,*' are hereby declared to apply to all such interest or coupons, dividends or profits, *wherever the same are or may be payable, and to whatsoever party or person the same are or may be payable, including non-residents, whether citizens or aliens.*"

This being the state of the law, on the 13th of June, 1866, (14 Stat. at L., 138,) Congress, in condensing and consolidating many other sections, carried into sections 120 and 122 the pith of the previous act, passed for the special reason already stated. In section 120 the words are, "wherever and whenever the same shall be payable to stockholders, policy-holders, etc., including non-residents." In section 122 they are transposed, and stand "whenever and wherever."

This recorded history of the phrase carries its own comment on its face, and I add but one remark. If the words "whenever payable" meant no matter whether ever certainly payable, the phrase would cut an odd figure in section 120. That section would then read, "On dividends, no matter whether ever certainly payable to stockholders, policy-holders, or depositors, or parties whatsoever, including non-residents, whether citizens or aliens." There, I think, is a test which must satisfy the mind of the court of the true definition of these words. It will be observed that, if the words imply only that the dividends spoken of are to be payable certainly and absolutely at some time—at any time whatever—the description is fatal to the idea that the certificates now in question are included and defined; as fatal, if it implies that they are to be ever certainly payable, as if it implies that they are to be payable at once. That the words do imply at least so much—at least that the dividends must be certainly payable at some time or other, is, I submit,

beyond all question. And further, to clinch this point, I remind your honors of these words, which stand immediately preceding in the same sentence, "or any such company that may have declared any dividend in scrip or money, *due or payable*, to its stockholders." Suppose the counsel could convince the court that any time for payment this side of eternity, if it be only a fixed time, will satisfy the words "due and payable," and the words "whenever payable," he must see that these words will still be a lion in his path, because they still demand that there shall be *some time* for payment, upon which the court and the law can lay hand, and say when that time arrives this obligation will be ripe, it will then have matured, and by law it can then be enforced. The trouble here is, there is no day of payment in time or eternity. Strain the construction to the utmost, and then it will be as effectual to show that the certificates in question are not embraced, as if it was confessedly written on the face of the statute, as we think it is, that dividends to be taxable must be due and payable at the time. It is matter of description, and that in a penal statute—a statute in derogation of common law and common right.

Finally, what theory or hint, in any statute, shall uphold the Commissioner of Internal Revenue in his attempt, by a mere *ipse dixit*, to assess six-fifteenths of these certificates, or reduce the prior assessment, and demand five per cent., or $510,423.60?

I deny that the Commissioner of Internal Revenue any more than the Secretary of War could make, alter, or give validity to an assessment. What is an assessment, and who can make it? The act of Congress answers. The officer empowered to make it is named; he is not the Commissioner of Internal Revenue. The mode and time, and place of making it, is prescribed. The assessment is to be in each year and for each year.

Where is the authority under which, by any process, the commissioner or anybody else may lump six or seven

years together, and by guess or conjecture impose an income tax in gross for the whole period?

Even if the case were one of ascertaining and taxing profits or gains, as distinguished from dividend, the proceeding would altogether overleap the law. But, in the present instance, such a proceeding is utterly at war with the original assessment, with the intent and purpose of the clause of the statute on which alone it could stand in any case, and with every notice and demand served on anybody in regard to it.

"Scrip dividend," and "dividend," was, first and last, the only thing insisted on or hinted at. No other claim was suggested, no other assessment made. If the certificates were a dividend, and taxable, were they not the thing to be taxed? Were they not an entirety—one whole thing? How came six undivided fifteenths to be taxable and not the other nine? If it be said that the nine were *abated*, that the commissioner, to avoid hardship or to consult equity, forgave nine-fifteenths, and that the plaintiff cannot complain, the answer is that the commissioner, even if he had power over assessments, could abate nothing unless he had something to abate. The fact is *jurisdictional*. He could not abate nine-fifteenths unless he could refuse to abate them, and that could only be because the nine-fifteenths could be held by the assessment as portion of the dividend assessed, and so were liable to tax. The government must prove title to fifteen-fifteenths before it can hold six-fifteenths or release nine. And here I refer to the case of The National Bank of Elmira v. The City of Elmira, (53 N. Y. R., 49,) where the court remarks that assessors cannot acquire jurisdiction by determining that they have it.

If the certificates were a "dividend," and, because a dividend made in 1868, taxable in that year, though based on earnings and accretions made prior to that or the previous year, what difference does it make when or how fast the earnings accrued? If the United States could

be permitted now to drop the idea of taxing the certificates as a dividend, and to adopt the theory of pursuing the earnings or profits of the plaintiff, how could the action of the *commissioner* stand, even if he were empowered to correct assessments? He, like the assessor, made none of the inquiries in such cases provided; he did not proceed under any of the provisions applicable to ascertaining and correcting "omissions," "understatements," "undervaluations," or concealments. It cannot be contended that he attempted to discover or ascertain anything exact or actual about the balance sheet of the New York Central, or its receipts or expenditures, gross or net. He merely fixed an arbitrary sum; he measured merely (as he supposed) by the time the income tax had existed. This fact alone excludes the idea of an assessment. The certificates speak of earnings "hitherto," that is, from 1853, onward; had the commissioner, even if he were the officer authorized to assess, any more right, without evidence or even probability, to assume that every year exactly so much was received and exactly so much expended, than he had to say that since 1861 enhancement of prices, inflation of currency, and expansion of everything, had doubled previous operations, and therefore he would exact twelve-fifteenths? Had such been his decree, it would at least have been supported, in some degree, by history, of which perhaps a court, without proof, might take notice. Can it be that a party may thus be denied all hearing; denied all opportunities of judicial or even official scrutiny, guaranteed by a rigorous statute, and despoiled of his property at random and by guess?

A statute which conferred or tolerated such despotic and lawless discretion would violate the genius of the Constitution and its plain letter. The income tax act, in its best estate, needs the apology of the highest public necessity, and is cramped by other provisions of the Constitution; but if it dispenses with even the semblance of

"due process of law," its nullity is written in a single line.

Had the commissioner abated the apparent value of the certificates because their actual or market value was less than par, the deduction might be explained on grounds of reason, perhaps of equity, however such action might transcend his statutory jurisdiction and function; but the deduction made is preposterous, and without warrant of law, if in truth the certificates are taxable as a dividend, or taxable at all. Suppose, in place of certificates, *stock* had been issued, a scrip dividend, plain and palpable, would the act allow an assessment of six undivided fifteenths, unless the other nine-fifteenths were equally liable? Whether a part might be released is another affair; but as matter of *jurisdiction*, under the law, must not the dividend, as a whole, be taxable, before any part of it would be subject either to assessment or release?

Fifth.

The case of the plaintiff in error abounds in minor difficulties. I will merely refer to some of them:

1. No "list" or "roll" was proved on the trial; and as we understand the law, the justification pleaded could not be made out without proving the "roll" or "list" required by the statute. Though the roll was in court, the counsel for the defendant below refused to introduce it.—(Record, pp. 54 to 57.)

2. The defendant below failed to make proof of the service of notices required by the statute, not only before but after the so-called assessment.

3. The exception (Record, p. 76, folio 126) under which alone it can be insisted that the question of the taxable character of the certificates can be reviewed, is so far inexact and ill-founded in fact, as to be of more than questionable validity. The "ruling and decision of the court," in this regard, is found at folio 125, p. 76. It

is in these words: "Entertaining these views *my conclusion is that the tax was erroneously assessed, and the defendant must pay the amount realized by his proceedings.*"

To this no exception was taken, but the exception was to other and different words not employed by the court, and certainly not used even in substance in "the ruling and decision."

It will be observed, contrary to one of the implications of the brief filed for the plaintiff in error, that the "ruling and decision" is such as to enable us to raise every question touching the validity of the assessment and distraint in any of their stages, and also every question touching the taxability of the certificates.

Sixth.

The two rulings of the court excluding evidence, (Record, pp. 70, 71, folios 114, 115) were right for reasons assigned in the brief filed for the defendant in error.—(p. 41.)

These rulings were right for one general reason, as well as for others. The whole class of evidence to which the exceptions relate was wholly immaterial and foreign to the issue on trial.

The issue was the validity of the justification pleaded. That justification was the so-called *assessment.* The assessment was specific. It was on the interest certificates. It treated these certificates as a "scrip dividend." It dealt with them as an entirity—as one thing—as a distinct, clearly marked subject. This they were. The assessment was all good or all bad. If it was illegal in nine-fifteenths it was illegal in fifteen-fifteenths. If a "scrip dividend" was made in a taxable year, it was taxable. This was the whole question. What the corporation did in other years, what else might have been assessed, what the corporation had received or expended, what a subsequent board of directors of another corpora-

tion did—all these things were as much beside the purpose as any irrelevant enquiry could be.

Seventh.

Beginning with a refusal to proceed against the only existing corporation responsible for taxes unpaid by the Central Company, if such taxes there were; dispensing with the modes of assessment enjoined by the statute; attempting to assess a dead person; blundering and failing in the service of required notices; refusing to abide by the decision of authorities selected by the government, to whom the question was referred; issuing warrants against a corporation never assessed; seizing property never owned by the alleged delinquent, but always belonging to another; admitting the injustice of the claim by attempting to split up an indivisible liability without even a reassessment or alteration of the assessment by any officer empowered to make or change assessments; rejecting every offer and request that suit might be brought in court with proper and apt allegations; insisting on the arbitrary and technical advantage of a sudden and secret assessment; the case presents a muddle of incongruities and ill-directed zeal, which would reflect little credit on an individual, and which it is believed could rarely be found even in the varied transactions of a great government compelled to act by agents, who, like other men, are liable, though unconsciously, to be swayed and moved by gusts of feeling, and by motives of gain and of applause.

Eighth.

The authorities cited in the brief filed for the plaintiff in error are reviewed in the opposing brief, and they are commended to the court as showing plainly the fallacies involved in the attempt to overturn the judgment of the circuit court.

ROSCOE CONKLING,
Of Counsel for the Defendant in Error.

Supreme Court of the United States.

JOHN M. BAILEY, PLAINTIFF IN ERROR,

against

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, DEFENDANT IN ERROR.

Statement of the Case and Brief on the part of Defendant in Error.

S. T. FAIRCHILD, *Attorney for Defendant in Error.*

ROSCOE CONKLING, *of Counsel.*

ALBANY:
THE ARGUS COMPANY, PRINTERS.
1875.

Supreme Court of the United States.

JOHN M. BAILEY, PLAINTIFF IN ERROR,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
DEFENDANT IN ERROR.

Brief on the part of the defendant in error.

I. STATEMENT OF THE CASE.

The New York Central Railroad Company was a corporation existing under the laws of the State of New York from May, 1853, to November 1, 1869. (See record, fol. 104.) On the 19th of December, 1868, the directors of the company passed resolutions authorizing the issue of certain certificates to the stockholders of the company, to the amount of eighty per cent of the amount of the capital stock of the company. The certificates were named "Interest Certificates," and the aggregate amount of them authorized by the said resolutions was $23,036,000. The amount of the capital stock of the company, at the time said resolutions were passed, was $28,795,000. The resolutions and certificate refer to each other, and all together, make the form of the certificate. The following is a copy of said resolutions and certificate:

THE NEW YORK CENTRAL RAILROAD COMPANY.

Whereas, This company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent of the capital stock of the company; and whereas, the several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period; now, therefore,

Resolved, That a certificate, signed by the president and treasurer of this company, be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per cent of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on the shares of the capital stock of the company, and that such certificates may be, at the option of the company, convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

Resolved, That such certificates be delivered to the stockholders of this company at the Union Trust Company, in the city of New York, on the presentation of their several certificates of stock, and that the receipt of the certificate provided for in these resolutions shall be indorsed on the stock certificate.

THE NEW YORK CENTRAL RAILROAD COMPANY.

No. *Interest Certificate.*

Under a resolution of the board of directors of this company, passed December 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that being the holder of shares of the capital stock of said company, is entitled to dollars payable ratably with the other certificates issued under said resolution at the pleasure of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

This certificate may be transferred on the books of the company on the surrender of this certificate.

In witness whereof, the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868.

——— ———, *President.*

———— ————, *Treasurer.*

For a valuableconsideration do hereby sell, assign and transfer all interest in the above certificate to , and do hereby irrevocably appoint attorney to execute a transfer thereof on the books of the railroad company therein mentioned.

See record, fols. 16, 27, 101 and 120.

The company declared two dividends of $921,440 each upon said interest certificates, payable respectively, February 20, and August 20, 1869, which were duly returned to the United States assessor, who assessed a tax of $46,072 upon each of said dividends, which tax the company paid. The company also declared two dividends of $1,151,800 each, upon its capital stock, payable, respectively, February 20 and August 20, 1869, which were also duly returned to the United States assessor, who assessed a tax of $57,590 upon each of said dividends, which tax also the company paid. (See record, fols. 9 and 104.) At the times these dividends upon the interest certificates and upon the stock were returned to the United States assessor, no claim was made by the officers of the government or any one of them, nor was any claim made by any of said officers at any other time, that the returns of said dividends were false, or, that as to them there was "any understatement or undervaluation," or, that there had been any neglect on the part of

the company to make a return as to the issue of said interest certificates; or that said returns should have included said interest certificates themselves as well as the dividends upon them, and no claim was made by any of these officers that said interest certificates were taxable until long afterward, and then only in the way hereinafter stated.

See record which contains no proof of any such claim.
See also amendment of section 14, of internal revenue law of 1864, at page 110 of Laws of 1866, in vol. 14 U. S. Statutes at Large.
See also amendment of section 20, of internal revenue law of 1864, at page 103 of Laws of 1866, in vol. 14 of U. S. Statutes at Large.
See also amendment of section 122, of internal revenue law of 1864, at page 138 of Laws of 1866, in vol. 14 of U. S. Statutes at Large.

On the 1st day of November, 1869, the New York Central Railroad Company, under the authority of an act of the legislature of the State of New York, entitled, "An act authorizing the consolidation of certain railroad companies," passed May 20, 1869, was consolidated with the Hudson River Railroad Company, into a new company by the name of "The New York Central and Hudson River Railroad Company," the defendant in error in this action, and from that day the New York Central Railroad Company ceased to exist, except for certain purposes specified in the act aforesaid.

See record, folios 73 and 74.

Said act is set out at length at pages 41, 42 and 43, of the record. The fifth section of said act provides that: "The rights of all creditors of, and all liens upon, the property of either of said corporations, parties to said agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, *and all debts and liabilities incurred by either of said corporations, except mortgages, shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it.*"

The internal revenue law of Congress, provides: "And all taxes may be sued for and recovered, in the name of the United States, in any proper form of action, before any

Circuit or District Court of the United States, for the district in which the liability to such tax may have been, or shall be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action." (See page 111 of Laws of 1866, vol. 14 of U. S. Statutes at Large.) Without this statute and by common law the United States can maintain an action to collect a tax.

See Pittsburg Dollar Savings Bank, plaintiff in error, v. The United States.

Nothing was heard of any claim to tax on account of said interest certificates until February 26, 1870, more than fourteen months after the certificates were authorized, and nearly four months after the New York Central Railroad Company had ceased to exist. *Then*, at a time when the New York Central Railroad Company was dead and could have no agent, and could not answer itself nor employ an attorney to answer or appear, or take notice; at a time when, in the language of the act aforesaid, "all and singular, the rights, privileges, exemptions and franchises," and "all the property, real and personal, and mixed" of the New York Central Railroad Company had been for nearly four months "transferred to and vested in" the new corporation — *then* the United States assessor, instead of taking measures to have the "liability" (if any) incurred by the New York Central Railroad Company, on account of said certificates, "enforced against the new company and its property," by suit, "in any proper form of action, before any Circuit or District Court of the United States for the district within which such liability" was incurred, as authorized and required by the aforesaid section 5 of the said act of the legislature of the State of New York, and by the provisions of the act of Congress and the decision of the United States Supreme Court above referred to, sent a notice directed to "Charles Wendell, Esq., acting treasurer, New York Central R. R. Company," and dated February 26, 1870, of which notice the following is a copy:

"ASSESSOR'S OFFICE, 14TH DISTRICT, N. Y.,
ALBANY, *February 26th*, 1870.

SIR — I am directed by the commissioner of internal revenue, through the supervisor of the Northern District of New York, to cause an assessment of taxes against the New York Central Railroad Company upon the scrip dividend, issued by resolution of the board of directors of said company, December 19th, 1868.

I am also requested to furnish the supervisor the names of persons to whom such scrip was issued. Will you please furnish me with the

amount of such dividend, and the names of the persons to whom the scrip was issued.

Respectfully,

R. P. LATHROP, *Assessor.*

CHARLES WENDELL, Esq., Acting Treasurer N. Y. Central R. R. Co."

It will be observed, on reading this notice, that the instruction to assess came through the supervisor, and that one of the objects of the notice was to get information that would satisfy the curiosity of the supervisor as to who were the stockholders of the company.

See record, fol. 78.

The assessor "received no answer, response or information from Mr. Wendell, nor from the New York Central Railroad Company in reply to the foregoing notice" for four days. Of course he didn't. The notice is dated Saturday. The next day was Sunday. The twenty-eighth of February and the first and second days of March — three working days — was the only time allowed to answer; manifestly not enough to ascertain and give the names of the stockholders, and answer otherwise properly, even had the power to answer existed. But there was no power to answer; there was no acting treasurer of the New York Central Railroad Company; there was no New York Central Railroad Company.

See record, fol. 78.

On the 3d of March, 1870, more than four months after the New York Central Railroad Company had ceased to exist, the United States assessor made what he called, and what is claimed on the part of the plaintiff in error in this case, an assessment against that company. That pretended assessment is the only justification proven on the part of the plaintiff in error for extorting from the defendant in error the moneys for which this action was brought; that pretended assessment was in writing, and the following is a copy of it, viz.:

"UNITED STATES INTERNAL REVENUE.

ASSESSMENT AGAINST THE NEW YORK CENTRAL RAILROAD COMPANY.

The New York Central Railroad Company having failed to make return of the scrip dividend, or interest certificates, voted at a meeting of the directors of said company, held December 19, 1868, as required to do by section 122, act June 30, 1864, act July 13, 1866, internal revenue laws.

Now, therefore, by the authority vested in me, and as required by the several sections of said internal revenue laws, I do assess against the president, directors and company of the New York Central Railroad, the following tax to wit:

Capital stock December 19, 1868	$28,795,000 00
Scrip dividend, or interest certificates, being eighty per cent of said capital	28,036,000 00
Tax on same at five per cent	$1,151,800 00
Penalty for failure (section 122)	1,000 00
Amount of tax	$1,152,800 00

RALPH P. LATHROP,
Assessor, Fourteenth District, N. Y.

ALBANY, *March* 3, 1870."

See record, fol. 78.

It will be observed on reading this pretended assessment that the grounds or reasons for making it are that the "company having failed to make return of the scrip dividend or interest certificates, voted at a meeting of the directors of said company, held December 19, 1868, as required to do by section 122, act June 30, 1864, act July 13, 1866, internal revenue laws." It will be observed, also, that this pretended assessment although entitled "assessment against the New York Central Railroad Company" is really made against another concern, "against the president, directors and company of the New York Central Railroad."

This pretended assessment was made on the day it bears date by the assessor alone in his office. No one else was present. He made no examination of the books or officers of the company for the purpose of ascertaining whether said certificates were one of the "objects liable to tax," under the internal revenue law, as required by section fourteen of that law, as amended by chapter 184 of the Laws of 1866. (See page 101 of Laws of 1866, vol 14, U. S. Statutes at Large.) He did not "enter upon the premises" of the company for the purpose of making a return of said certificates as an object of taxation, as it is made his duty to do by section fourteen aforesaid. (See page 102 of Laws of 1866, vol. 14, U. S. Statutes at Large.) He did not give notice when an appeal from said assessment could be heard as required by section nineteen of said law. (See page 102, above referred to of U. S. Statutes.) Having ascertained that his lists to the collector containing the taxes on the four dividends on the certificates and stock payable February 20

and August 20, 1869, before referred to, were imperfect "in consequence of" the "omission or understatement or undervaluation or false or fraudulent statement contained in" the returns of said dividends made to him by the company by having "omitted" said certificates in said returns, the assessor did not, in any respect, regard that provision of section twenty of said internal revenue law, which reads as follows, viz.: "And all the provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed." (See page 104 of Laws of 1866, vol. 14, U. S. Statutes at Large.

The assessor did not take the trouble to inquire whether it was the existing or the dead corporation that was liable for the tax. He did not even learn the true name of the corporation that he intended to tax. He ascertained the amount of the scrip dividend from an Assembly Document. He did nothing in regard to said assessment except to write the paper dated March 3, 1870, and to hand it the next day to the collector, the plaintiff in error in this case, and send the notice to Mr. Wendell. No one of his assistant assessors ever did any act in regard to said scrip dividend.

See record, folio 80.

He made this pretended assessment without inquiry or notice, but blindly and arbitrarily by direction of the supervisor, assessing five per cent upon the whole $23,036,000 of certificates as a scrip dividend, adding $1,000 as a penalty for having failed to make return of the scrip dividend as required by section 122 of the internal revenue law. By reading that section, it will be seen that it requires railroad companies to make returns as to their dividends "on or before the tenth day of the month following that in which said dividends became due and payable." By reading the certificate, it will be seen that it is payable "at some convenient future period, at the pleasure of the company, out of future earnings." The assessor seems to have supposed that all this had happened ten days before, and that, therefore, the company was liable to a tax of five per cent on the whole $23,036,000, with a penalty of $1,000 for neglect to make return, and that it was his duty not only to assess the tax but also to impose the penalty. The truth probably is, that the assessor, who lived in the same place where the company's office was, and who knew all the facts about the certificates, did not act upon his own judgment in making the

assessment, but acted, as he says in his notice aforesaid to Wendell, dated February 26, 1870, "by direction of the commissioner of internal revenue, through the supervisor of the northern district of New York." The fact that the assessor, in making this assessment, acted by order of some one who had made no inquiry, and knew nothing probably of the facts about the certificates, and not upon his own judgment, is also proven by the testimony of the assessor on the trial of this action. He testified, "I acted as commissioner with Mr. Orton and Mr. Smyth, and signed the report with them."

See record, folio 80.

In that report these commissioners say, and report to the commissioner of internal revenue, that "the distribution of these certificates did not create a liability to tax, and, therefore, that the company was not liable to the assessment from which it has appealed."

See record, folio 30.

Upon this pretended assessment, so made, rests the defense of this action. It has nothing else to stand upon.

It will be observed that the assessor, in the assessment, refers to section 122 for his authority, and his authority must be found in that section if anywhere. The following are all the words of that section having any applicability to this case, leaving out all about coupons and interest and non-residents, but retaining, in order to make it entirely intelligible to the court, that part only of the section which relates to dividends and to railroads:

"That any railroad company that may have declared any dividend in scrip or money, due or payable to its stockholders as part of the earnings, profits, income or gains of such company, shall be subject to and pay a tax of five per centum on the amount of all such dividends, whenever the same shall be payable, and said companies are hereby authorized to deduct and withhold from all payments on account of any dividends due and payable as aforesaid, the tax of five per centum, and the payment of the amount of said tax so deducted from the dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend * * * and a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which said dividends became due and payable, and

as often as every six months. And said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the commissioner of internal revenue that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of $1,000, and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

See ch. 184, Laws of 1866; U. S. Statutes at Large, p. 138.

It will also be observed, by reading the assessment, that the tax is not imposed on account of "profits carried to the account of any fund" in the language of the aforesaid section 122. If the tax had been imposed for that reason, the line of defense would have been very different from that which has been pursued in this case. The notice annexed to the plea would have set up that the tax was imposed for that cause and not because of a scrip dividend, and the evidence upon the trial on both sides would have been directed to the inquiry whether the moneys used were "profits carried to the account of any fund, or used for construction," or only an accumulation of earnings, held in general account, and to be used to meet current bills and pay-rolls for materials and labor. The inquiry on both sides would have been whether the moneys were "used for construction," or for the purchase of property, and for repairs and maintenance of property, which are not construction. The assessment was not because of "profits carried to the account of any fund, or used for construction," but it was because of the issue of the interest certificates as a scrip dividend, and the question in this case is: Was that assessment a lawful one?

See assessment at folio 78 of record, and notice annexed to plea at folios 51, 52 and 62 of record setting up the issue of the certificates as a scrip dividend, and see all the evidence in the case.

On the 4th of March, 1870, the assessor delivered the assessment aforesaid to the collector, the plaintiff in error in this action, and upon that assessment solely, the collector justifies himself in compelling the defendant in error to pay the moneys for the recovery of which this action was brought. No other paper or proceeding in justification was proven upon the trial of this action. This assessment was delivered to the collector on the 4th of March, 1870.

See testimony of Lathrop and Bailey, at folios 79 and 80 of record.

There is no evidence in the case that any other paper was ever delivered by the assessor to the collector. Lathrop testifies, "on the 4th of March, 1870, I delivered the assessment to John M. Bailey, the defendant herein, at the city of Albany." (See record, folio 79.) Bailey testifies, "I received from him [Lathrop], at Albany, March 4, 1870, a paper which I think was an assessment or list against the New York Central Railroad in this case; I caused the company to be notified to pay the tax; notices were issued to the company; the first notice is dated March 4, 1870." (See record, folio 80.) That notice was put in evidence, and the following is a copy of it:

"*Monthly Notice.*

DIST. —— DIV.

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
FOURTEENTH DISTRICT, STATE OF NEW YORK,
ALBANY, N. Y., *March* 4, 1870.

M —— Treasurer New York Central Railroad, Albany, N. Y.

The tax assessed against N. Y. C. R. R. for dividend amounting to $1,152,800.00 is due and payable on or before the fourteenth day of March, and, unless paid within that time, it will become my duty to collect the same, with a penalty of five per centum additional, and interest at one per centum per month.

J. M. BAILEY, *Collector.*

Bring this notice with you."

It will be observed that it is addressed to the treasurer of a railroad, a thing made of wood and earth and iron and which was in existence — it is not addressed to any company, dead or alive — and it speaks of a tax of $1,152,800 for dividend, thus connecting it with the assessment aforesaid. The collector's deputy, Livingston, testifies: "About the 4th of March, 1870, I served upon Charles Wendell, in the Treasurer's Office of the New York Central Railroad Company at Albany, a demand notice; it is my impression that I served other notices, but I have not sufficient recollection to state whether I did or not; I knew

of Mr. Wendell being connected with the New York Central Railroad Company, at Albany." (See record, folio 97.) The above notice, dated March 4, 1870, is not a "demand notice," and it was not served by Bailey. A demand notice was subsequently made out by the collector, and dated March 15, 1870, and will be found at folio 81 of the record. Which of these notices was served by the deputy, Livingston, or whether either of them was served, does not appear in evidence. The fact that the witness "knew of Wendell being connected with the New York Central Railroad Company, at Albany," in some capacity, what he does not say, while that company was in existence, is immaterial in this case; he could not have been connected with that company after it ceased to exist.

The demand notice above referred to, dated March 15, 1870, was addressed "The New York Central Railroad Company or The New York Central and Hudson River Railroad Company," and it says: "A tax under the excise laws of the United States, amounting to $1,152,800, being a tax on scrip dividend, has been assessed against you, and transmitted to me by the assessor of this district," etc. (*See notice at length on page* 48 *of the record.*) There is no evidence that this notice was ever served upon anybody.

On the 24th of February, 1872, the commissioner of internal revenue in a letter dated on that day, and addressed to the assessor who made the assessment of March 3d, 1870, says: "I have concluded that the company is liable to a tax of five per cent, without penalty, on $9,214,400, being six-fifteenths of the entire dividend, the proportionate amount chargeable to the period between September 30th, 1862, and September 30th, 1868. This will reduce the assessment to $460,720, which I have instructed Collector Bailey to collect. On its payment, and the presentation of the proper vouchers, the remainder of the assessment, viz., $692,080, including the $1,000 penalty, will be abated." (*See notice at length at folio* 79 *of record.*) It will be observed that the commissioner does not abate either the $1,000 penalty or the nine-fifteenths, although he admits that both are illegal. He holds the whole suspended as a threat and a sword, to be removed in case six-fifteenths of the robbery is voluntarily yielded, otherwise to be allowed to fall. It is in this way that a great government deals with its grown-up subjects. For what reason, or by what authority, the commissioner concluded to abate the penalty and nine-fifteenths of tax, on condition of the payment of the remaining six-fifteenths, does not anywhere appear.

On the 4th of March, 1870, the assessor delivered the assessment aforesaid to the collector, the plaintiff in error in this action, and upon that assessment solely, the collector justifies himself in compelling the defendant in error to pay the moneys for the recovery of which this action was brought. No other paper or proceeding in justification was proven upon the trial of this action. This assessment was delivered to the collector on the 4th of March, 1870.

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On the 24th of February, 1872, the commissioner of internal revenue in a letter dated on that day, and addressed to the assessor who made the assessment of March 3d, 1870, says: "I have concluded that the company is liable to a tax of five per cent, without penalty, on $9,214,400, being six-fifteenths of the entire dividend, the proportionate amount chargeable to the period between September 30th, 1862, and September 30th, 1868. This will reduce the assessment to $460,720, which I have instructed Collector Bailey to collect. On its payment, and the presentation of the proper vouchers, the remainder of the assessment, viz., $692,080, including the $1,000 penalty, will be abated." (*See notice at length at folio* 79 *of record.*) It will be observed that the commissioner does not abate either the $1,000 penalty or the nine-fifteenths, although he admits that both are illegal. He holds the whole suspended as a threat and a sword, to be removed in case six-fifteenths of the robbery is voluntarily yielded, otherwise to be allowed to fall. It is in this way that a great government deals with its grown-up subjects. For what reason, or by what authority, the commissioner concluded to abate the penalty and nine-fifteenths of tax, on condition of the payment of the remaining six-fifteenths, does not anywhere appear.

He seemed to have reasoned in this way: "As the company was in existence fifteen years, viz: from May, 1853, to December 19, 1868, when the certificates were authorized, and as the internal revenue law was in existence six of that fifteen years, viz., from September 30th, 1862, to September 30th, 1868, therefore the company is liable to six-fifteenths of the tax, and if they will pay that, all else shall be remitted."

On the 26th of February, 1872, the collector caused a notice of that date to be served upon the secretary of the defendant in error, demanding a tax of $460,720. This notice is addressed to "The New York Central Railroad Company or The New York Central and Hudson River Railroad Company," *and will be found at folio* 82 *of the record.*

On the 15th of March, 1872, the collector caused another notice of that date to be served on said secretary, demanding a tax of $460,720, and a penalty of $23,036, in all $483,756. This notice is addressed "New York Central, or New York Central and Hudson R. Rd. Co.," and will be found at length at page 49 of record. Both these notices claim tax on account of scrip dividend.

The collector and plaintiff in error afterwards seized, and on the 22d of March, 1873, sold seventeen locomotive engines and tenders belonging to the defendant in error, and received therefor, on such sale, $17,000. Said collector afterwards seized, and on the 23d of April, 1873, sold eight other locomotive engines and tenders belonging to the defendant in error, and received therefor, on such sale, $22,750. (See record, folio 74.) Both these sales were forbidden by the defendant in error, by notices in writing, which will be found at pages 44 and 45 of record. Said collector afterwards seized twenty-three other locomotive engines and tenders, and thirty-six passenger coaches and three baggage cars, all the property of the defendant in error, and advertised the same for sale, and threatened to seize and sell other property of the defendant in error. Whereupon the defendant in error, for the purpose of avoiding a sale of its property by said collector, on the 13th of May, 1873, paid him, under protest, $446,270.12, and on the 17th of May, 1873, also under protest, the further sum of $64,153.48. Said protests were in writing, and were delivered to said collector at the times of said payments respectively, and are annexed to the declaration in this action, and marked respectively "E" and "F."

See record, pages 10, 11, 43 and 44.

The defendant in error appealed to the commissioner of internal revenue to pay back the moneys so received by said collector, and said appeal was refused by said commissioner.

See record, folio 77.

Afterwards, and on the 23d of May, 1873, this action was commenced in the Supreme Court of the State of New York. The complaint in the action claims to recover the moneys so received by said collector as aforesaid, with interest and costs. Said action was removed, upon the petition of said collector, from the Supreme Court of the State of New York to the Circuit Court of the United States for the Northern District of New York, and there said collector pleaded to said complaint. The plea denies each and every allegation of said complaint, and a notice of special matter is attached to it, setting up the issue of said certificates as a scrip dividend by the defendant in error, and the assessment aforesaid of March 3d, 1870, as justification. The defendant in error replied to said plea, taking issue, and putting itself upon the country.

See record, pages 1 to 40.

Issue being so joined, the action was brought to trial before the Hon. William J. Wallace, a justice of said Circuit Court, and a jury, at a term of said court, held at Canandaigua on the third Tuesday in June, 1874.

Upon said trial, the defendant in error proved the allegations of its complaint in regard to its incorporation and the forbidden sales and enforced payments, and appeal to the commissioner for refunding, and rested.

The said collector, upon said trial, called five witnesses the assessor, the collector himself and his two deputies, and Edwin D. Worcester, the secretary of the defendant in error. Said collector proved by said assessor the service on said Wendell of said notice of February 26, 1870, said pretended assessment of March 3d, 1870, and the delivery of it the next day to the collector, and the notice of the decision of the commissioner of internal revenue to abate nine-fifteenths of the tax and the penalty of $1,000 assessed by the assessor. On his cross-examination the witness testified to the manner in which said assessment was made, and his neglect to make any inquiry or examination in regard to the liability to tax.

See his testimony, on pages 45, 46 and 47 of record.

By the collector himself, he proved the receipt by him, on the 4th of March, 1870, from the assessor of said assessment of March 3d, 1870. There was an attempt, also, to prove by him the receipt by him from the assessor of some other paper, but it failed, and no other paper was proven or offered in evidence to sustain the defense.

See his testimony, pages 47 to 58 of record.

By William H. Livingston, one of the collector's deputies, he attempted to show the service of certain notices on Worcester, but failed to show anything.

See his testimony, at page 58 of record.

By Hugh J. Connell, his other deputy, the collector proved the service of a notice on the 26th of February, 1872, upon the secretary of the defendant in error. The notice was not read in evidence, and it does not appear what it was about. This witness also proves the service on Worcester, on the 15th of March, 1872, of the notice of that date, found on page 49 of record. The collector also, through this witness, gave certain other testimony immaterial in the case, viz.: That these warrants were issued to him by the collector, his principal, and the service on Mr. Worcester of notice of one distraint, and on Warren S. Low of notice of another distraint.

See his testimony, at pages 58, 59 and 60 of record.

By the witness Worcester, the collector proved that the capital stock of the New York Central Railroad Company, on the 19th December, 1868, was $28,795,000, and that it was all issued, and that the whole amount of the interest certificates authorized was $23,036,000, and that at the time the witness was testifying, $22,000,000, possibly $22,500,000, of the certificates had been issued. On his cross-examination, this witness testified that the capital stock of the New York Central Railroad Company had all been issued before December 19, 1868, and no more stock remained to be issued when the interest certificates of December 19, 1868, were issued, and that the New York Central Railroad Company had not on hand December 19, 1868, any earnings, profits, income, gains or moneys on which said certificates were based, or with which they could be paid.

See his testimony at pages 61 and 62 of record.

The counsel for the collector proved the form of the interest certificates and the resolutions authorizing the same.

See pages 60 and 61 of record.

The counsel for the collector also proved an act of the legislature of the State of New York, authorizing the increase of the stock of the New York Central Railroad Company, passed May 20, 1869. There was no proof that the company ever acted under the law, and the fact is, that the company never did act under that law.

See act, at page 62 of record.

The counsel for the plaintiff in error then offered in evidence copies of the annual reports, made by the New York Central Railroad Company to the State Engineer, for the years ending September 30, 1862, 1863, 1864, 1865, 1866, 1867 and 1868, and of like reports made by the defendant in error for the years ending September 30, 1870, 1871, 1872, and 1873. The reports were then considered as read in evidence, but were not then read.

See record, folio 104.

The counsel for the plaintiff in error, in offering said reports previous to 1869, stated to the court that his object in offering them was to show what portion of the earnings referred to in said interest certificates had been realized since the internal revenue law went into operation, and they were admitted in evidence upon that statement.

See record, folio 115.

The counsel for the plaintiff in error here rested his case, and the counsel for the defendant in error requested the court to hold according to each of the five propositions, following, separately and severally, viz.:

1st. The assessor had no authority in the premises, save that given by the internal revenue laws of Congress, and at the time of the so-called assessment, March 3, 1870, no action was warrantable by the assessor, unless the New York Central Railroad Company was in default under said internal revenue laws. There must have been a time, certain, when the corporation was bound to make a list or return of a "scrip dividend" of $23,036,000, which it neglected to make or made falsely. This default must be shown as a

jurisdictional fact, and as a condition precedent to any action whatever by the assessor or other officer of the revenue.

2d. Assuming that default had been made, the assessment and action by the assessor were illegal and void, because not in accordance with the statute but in violation of it. If default or omission had occurred, the statute points out the way, and the only way, in which the assessor might proceed. The alleged delinquent must be summoned or have notice, and given a hearing, with a view to "the ascertainment of the liability to tax;" an inquiry must be made into the facts and the assessor must view, consider and determine. Time and opportunity for appeal to the assessor must be permitted, and this quasi-judicial examination is secured during the whole fifteen months within which the tax claimed may be pursued by assessment.

3d. The pretended assessment was against the New York Central Railroad Company, and against nobody else. This corporation had ceased to exist more than four months before. On the 1st day of November, 1869, the New York Central Railroad Company became extinct in law and in fact. It could not afterward sue or be sued. It could not speak or act, and an assessment against it was, in all legal intents, an assessment against a dead person. No lien could be created or legal effect be produced by such an assessment. If, in its lifetime, the corporation owed a tax, this debt, as a "liability," survived, and attached to the new corporation the New York Central and Hudson River Railroad Company. The statutes of New York of May 20, 1869, preserved it as a "liability," and section 41 of the act of Congress of June 30, 1864, as amended in 1866, gives the United States a full and clear remedy in a proper form of action before any Circuit or District Court of the United States.

4th. The seizure was of the property of the plaintiff on an assessment against another person, and that person dead long before the assessment was made. It is the case of seizing the goods of one man on an execution against another which execution was void as to everybody.

5th. If the defendant or the United States, by the so-called assessment, acquired a lien upon the property of the New York Central Railroad Company, even then the seizure complained of, would be illegal and void. A lien is specific, and binds only the property to which it attaches at first. It does not grow and spread over other property, particularly the property of third persons. And had the defendant pos-

sessed a lien, fixed, on the 3rd day of March, 1870, he must, of course, take the very property on which it had fastened. If this property was the whole property of the New York Central Railroad Company, still the lien was confined to that property. And when, three years afterward, the defendant seized, indiscriminately, the property of the plaintiff, and threatened to continue to seize until he arrested its business, the act was a trespass, without regard to the question whether there was or was not a lien upon such property as had belonged to the New York Central Railroad Company.

The court refused to hold according to either of said propositions.

See record, pages 63 and 64.

The counsel for the plaintiff in error then read from said reports of 1862 and 1868 certain statements which are deemed by the counsel for the defendant in error as wholly immaterial in this case. The object of the plaintiff in error was to contrast the amounts of the capital stock, cost of road, funded debt and property of the company in 1862, with those of 1868, for the purpose of showing what amount of the earnings referred to accrued during the life of the internal revenue law. This testimony will be found on page 64 of the record.

The counsel for the plaintiff in error then read from the reports of the New York Central Railroad Company for the years 1862, 1863, 1864, 1865, 1866, 1867 and 1868, a statement of the earnings, receipts and payments, other than for construction of the company for these years:

By this statement it appears that the whole amount of all the earnings and receipts of the company during all these years was	$90,185,476 43
The payments of the company other than for construction during such period were	85,051,492 23
Leaving whole surplus during that period	$5,133,984 20
The whole surplus of the earnings and receipts of the company from all sources from September 30th, 1861, eleven months before the internal revenue law went into operation, up to September 30th, 1868, being brought down is	$5,133,984 20
Of that surplus the company used during that period in paying of its funded debt	2,820,689 23
Leaving only	$2,313,294 97

That could by any possibility have formed a part of the earnings referred to in the certificates, and proves conclusively that at least $20,722,705.03 of the earnings referred to in the certificates, must have been realized before the internal revenue law went into operation, viz.:

Whole amount of interest certificates	$23,036,000 00
Surplus of earnings since internal revenue law went into operation	2,313,294 97
Realized before 1862	$20,722,705 03

As the law stood from September 1, 1862, to June 30, 1864, the tax on railroad companies was three per cent on gross receipts, and only three per cent on dividends. After June 30th, 1864, the tax on dividends was five per cent. The officers of the government, in making the assessment of March 3d, 1870, assumed that the whole $23,036,000 referred to in the interest certificates, had accumulated during the four years, five months and nineteen days, between June 30, 1864, and December 19, 1868, and therefore made an assessment of five per cent upon that whole amount. The commissioner of internal revenue, when he concluded that the company was liable to only six-fifteenths of the tax, assumed that $9,214,400, of the $23,036,000 was realized during the six years between September 30, 1862, and September 30, 1868, and gave instructions to the collector to collect five per cent upon that amount, disregarding the law which limited the tax during the one year and nine months, between September 30, 1862, and June 30, 1864, to three per cent. These statements of earnings, receipts and expenditures, other than for construction, will be found on pages 65, 66, 67, 68 and 69 of record.

The counsel for the plaintiff in error offered in evidence certain additional statements annexed to the reports of the company, not signed by any person, nor verified, for the purpose of showing that certain items which arose from the earnings of the company were carried to the transportation account, and invested in construction *or the purchase of additional property*, and are not specifically enumerated; which was objected to by the counsel for the defendant in error, on the following grounds:

1st. The evidence was incompetent.

2d. These additional statements are not a part of the reports of the company as required by law.

3d. They are not in fact a part of the reports of the company.

The court sustained the objection and the counsel for the plaintiff in error excepted to the decision.

See record, pages 69 and 70.

The counsel for the plaintiff in error offered to read from the reports of the New York Central Railroad Company for the year 1869, and from the reports from the defendant in error for the years 1870, 1871 and 1872, for the purpose of showing that the interest certificates were merged in the capital stock of the defendant in error in 1872, and that dividends were declared and paid on such interest certificates in 1869, 1870 and 1871, the same as upon the capital stock. The counsel for the defendant in error objected to said evidence, upon the ground that it was immaterial what was done with said certificates after they were issued; that the question was whether they were taxable by their character and the circumstances existing at the time they were issued, and that said evidence was incompetent and immaterial. The court sustained the objection, and the counsel for the plaintiff in error excepted to such ruling.

See folio 115 of record.

The plaintiff in error then rested and the evidence was closed.

The counsel for the defendant in error then asked the court to instruct the jury according to each of the following eight propositions, severally and respectively, viz.:

1st. The $1,000 penalty included in the assessment made by the assessor Ralph P. Lathrop, on the 3d day of March, 1870, and testified to by him, rendered the whole assessment illegal and void.

2d. Assuming that by the issue of the interest certificates by the New York Central Railroad Company on the 19th day of December, 1868, any liability to tax was incurred under the laws of the United States, the only proper remedy for the collection of that tax, after said company ceased to exist, was by suit in the name of the United States, in a proper form of action in a Circuit or District Court of the United States.

3d. The New York Central Railroad Company having ceased to exist on the 1st day of November, 1869, the assessment afterward made against it on the 3d of March, 1870, was void.

4th. It was not lawful by virtue of the alleged assessment against the New York Central Railroad Company of which

proof has been given, to seize the property of the plaintiff which had never belonged to the New York Central Railroad Company.

5th. No valid assessment roll or list, has been proved as made by the assessor and delivered to the collector as required by law.

6th. No default by failing to make return, or by making false return, has been shown against the New York Central Railroad Company, such as authorized the assessor to make the so-called assessment, made March 3d, 1870, and of which proof has been given.

7th. The right of the assessor to assess was confined to fifteen months after any alleged default, and no assessment could be made on the 3d of March, 1870, for any tax imposed by any act of Congress repealed in 1864.

8th. The certificates issued by vote of the directors of the New York Central Railroad Company December 19th, 1868, were not taxable under the internal revenue acts of the United States, except in respect of the interest or dividends paid thereon.

The court thereupon rendered its decision in writing, which will be found at pages 71 to 76 of the record.

The counsel for the plaintiff in error then made an exception to said decision in the following language: "To which ruling and decision of the court, to wit, that the New York Central Railroad Company did not declare a dividend in scrip by the issue of the so-called interest certificates of December 19, 1868, within the meaning of section 122 of the internal revenue law referred to, the counsel for the defendant then and there duly excepted." (See record, folio 126.) No such ruling as that specified in the above exception is found in the decision of the judge. His conclusion and decision is "that the tax was erroneously assessed and the defendant must pay the amount realized by his proceedings."

See record, folio 125.

The court thereupon directed the jury to render a verdict for the plaintiff for the sum of $594,002.89, to which direction, ruling and decision the counsel for the defendant excepted. (See record, folio 126.) The jury thereupon, under such direction, rendered a verdict for the plaintiff, the defendant in error, for $594,002.89, which was the amount of the moneys realized by said collector as aforesaid, and interest.

II. Brief of Argument on the Part of Defendant in Error, and Points of Law and Fact to be Discussed.

1*st. The issuing of the interest certificates by the New York Central Railroad Company on the* 19*th of December,* 1868, *was not the declaration of a dividend in scrip, such as is described and made taxable by section* 122 *of the internal revenue law.*

The decision of this point depends upon the construction of said section 122 and of said certificates, and that section and the certificates should be read together. They will be found hereinbefore copied at length. (See pp. 1 and 8.) By reading said section it will be seen that to make these certificates taxable as a scrip dividend under it, they must have the following seven requisites: 1st. They must be a dividend in scrip. 2d. The scrip must be of such a character as to create an absolute obligation on the part of the company by which the amount of the dividend is due or payable to its stockholders without contingency. 3d. The dividend must be a part of the earnings, profits, income or gains of the company already accumulated and on hand and capable of division. 4th. The dividend must all be payable immediately upon the issue of the certificates. 5th. The amount of the dividend must be certain and of such a character that the company can deduct from it the amount of the tax. 6th. The amount of the dividend must be certain and fixed, so as to enable the company to return the tax, and the president and treasurer to swear that it contains a true and faithful account of the tax. 7th. The dividend must be payable at some fixed time, so that the company may know that it has made the return of the tax on or before the tenth day of the month following that in which the dividend became due and payable.

The distribution of these interest certificates has no one of the seven requisites above specified — not one of them.

1st. It is not the scrip dividend referred to in the statute. And on this point, the court is referred to the following authorities defining a scrip dividend: Webster defines scrip to be "a certificate of stock subscribed to a bank or other company, or of a share of other joint property; one of the forms of certificate given in exchange for a loan, as 'consol scrip,' 'reduced scrip,' which may be sold separately as such until all the installments of the loan are paid, after which the term is no longer applied to it;" it is an obligation giving an interest, a partial interest, the whole of it to be acquired when the remainder is paid up, so as to make it full.

Bouvier in his Law Dictionary, under terms of law, defines it "a portion of the principal or profits divided among several owners of a thing; the term is usually applied to the division of profits arising out of bank or other stock, or to the division among the creditors of the effects of an insolvent estate." Worcester defines scrip "a kind of certificate in evidence of some property or interest possessed, as in bank stock, city stock, railway stock, government stock." Worcester defines a dividend to be "a share, a division, especially a share or sum paid to creditors out of the estate of a bankrupt, or to proprietors from the interest of annual income of a bank or other stock."

2d. These certificates impose no obligation upon the company issuing them, to pay them at any time. The only obligation assumed by the company in issuing them, is to pay dividends upon them at the same rates and times as dividends shall be paid upon the shares of the capital stock, and they do not even create an obligation upon the company to make dividends upon its capital stock. It cannot, therefore, be said, in any sense, that the amount of these certificates is, in the language of said section 122, "due or payable to its stockholders." One of the definitions of scrip is "a small piece of paper containing a writing — a schedule, a small writing." If that is the kind of scrip which Congress meant in said section 122, then these certificates are taxable, because they are "small writings," and they have been scattered among stockholders. But Congress used those words "due or payable to its stockholders," with a purpose. They did not mean to tax a scattering among stockholders of "small writings," which created no obligation. No action can be maintained upon these certificates, except an action for dividends. Whenever the company divides on its stock, these certificates require it to divide also upon them. That is the only absolute obligation upon the company created by these certificates. The only effect of these certificates is to distribute the net earnings of the company between the stock and interest certificates.

3d. The certificates are not payable out of, or as a part of, accumulated earnings. The company had no accumulated earnings to divide. The certificates recite that the earnings referred to in them had all been spent by the company in constructing and equipping its road, and in the purchase of property, which could not be divided. A dividend of borrowed money would not be taxable. The law taxes a dividend in scrip as a part of the earnings, profits, income

or gains of the company. These certificates do not profess to make a dividend. After reciting the expenditure of earnings equal to eighty per cent of the stock they say the stockholders are entitled, not to a dividend, but "to evidence of such expenditure, and to reimbursement of the same" — not now, not immediately, not absolutely even at some future period, but "at some convenient future period, at the option of the company, out of its future earnings." Will there be any earnings in the future? If so, how much? and if enough to pay the certificates in full, will it be the pleasure of the company to pay them? Will it not at that remote day prefer to use the money in paying its debts, or making four tracks and other improvements upon the road?

4th. The certificates are not payable on demand. They have been treated in the imposition of this tax as if payable immediately, or as if they themselves were a dividend. They are payable only at some convenient future period at the pleasure of the company, out of future earnings. Will that convenient period ever come; will there be earnings enough; and if so, will it then be the pleasure of the company to pay? And yet, all these things must occur before the holders of these certificates get anything.

5th. The amount of the dividends is entirely uncertain. There may be no earnings. It is impossible to make any deduction from these certificates, so as to withhold a tax. What could the company have deducted from these certificates? The dividend referred to in said section 122, is one that is capable of division, and from which the tax may be deducted. Could the company have deducted from these certificates $1,152,800, so as to anticipate what the assessor might do on the 3d of March, 1870, including his tax of $1,151,800 and his $1,000 penalty? How are they to make a deduction? Shall they make the amount of the certificates less the amount of the tax, and pay $1,152,800 in money as the tax? The whole $23,036,000 of certificates may not be worth the amount of the tax.

6th. The amount to be realized on these certificates is entirely uncertain. It is impossible, therefore, as to them, to comply with that provision of the statute which requires the company to return the tax on them, and the president or treasurer to swear that the return is true.

7th. The certificates are not payable at any certain time, and it is impossible for any one to say when the tenth day of the month following that in which they are due will arrive.

A dividend is a distribution of something on hand in which the recipients of the dividend have an interest. The company making the dividend must part with the control of something which it has, and the stockholder must acquire something which he did not have before. The company in issuing these certificates parted with no control over any property that it had. A stockholder acquired no interest in anything that he did not have before, no interest except what he had before, none whatever. These certificates and the stock certificates represent precisely the same property, real and personal, of every description, after the certificates were issued that the stock certificates represented before. The company parted with nothing, and the stockholder got nothing. In the issue of these certificates, the company parted with no control over any part of its property on hand. It incurred no obligation as to any present or future property. The stockholders receiving the certificate received nothing that they did not own before, except another piece of paper, another evidence of that which they owned before.

If these certificates had never been issued, the stockholders would have received precisely the same dividends upon their stock that they now receive upon their stock and interest certificates. It would have been a dividend of the net profits of the company distributed among the stock certificates, instead of being distributed between the stock certificates and the interest certificates. The stockholder acquired nothing whatever he did not own before, except another piece of paper; another evidence of his joint ownership in property that he had a joint ownership in before, and to the same extent precisely.

Suppose the strongest conceivable case; suppose that the company on the 19th of December, 1868, had on hand $23,036,000 of accumulated earnings? Not taking the case which really existed — the case of earnings spent for *property* on hand — but supposing a case where the company has on hand the whole amount of these certificates, the whole nominal amount, $23,036,000, *in money*, and that money, too, of *earnings*, bringing the case clearly within the terms of the statute as to the description of the thing to be divided, and suppose that the directors had passed a resolution substantially like the one they did pass: "*Whereas*, This company has on hand $23,036,000 in money of accumulated earnings, being eighty per cent of the amount of the capital stock, and whereas the stockholders are entitled

to evidence that the company has this money, and to reimbursement therefor, not now, but at some convenient future period, at some time hereafter when it shall be convenient for the company to make reimbursement; now, therefore, *Resolved*, That certificates be issued to the stockholders, declaring that they are entitled to eighty per cent of the amount of their stock, payable — not now, not absolutely — but hereafter, when it shall be convenient, and it shall be the pleasure of the company to pay; not out of the aforesaid $23,036,000 now on hand, that the company thinks it necessary to keep for other purposes; for paying the debts of the company; for building additional tracks or for other improvements; we do not propose to divide that; that we want to use to lay four tracks or to pay our debts; we owe $15,000,000 or $20,000,000; we prefer to use it in that way; we shall want to double track or lay four tracks; we want additional improvements; we have this money on hand; we will not borrow, but we will use this money that we have on hand; we will not divide that; we cannot divide that consistently with the interests of the company; therefore, the certificates shall be made payable, not out of the aforesaid $23,036,000 on hand, but out of the future earnings of the company, in case they shall prove to be sufficient, and it shall then be the pleasure of the company to pay." Would the distribution of these certificates among the stockholders be a dividend of the $23,036,000 on hand, or of any other amount among the stockholders, as part of the earnings of the company, and taxable as such under the law? The internal revenue law taxes a railroad company that may have declared any dividend in scrip or money, due or payable to its stockholders, as part of the earnings, profits, income or gains of such company, five per cent on the amount of all such dividends "whenever the same shall be payable." When are these certificates payable? At some convenient future period, at the pleasure of the company. Not as a part of the earnings, profits, income or gains of the company, which they have on hand, but out of future earnings. That is, if, in the prudent management of the company, it shall turn out hereafter that the company makes earnings sufficient, after paying its expenses and meeting all its other obligations — if it makes earnings sufficient to pay, and it shall be convenient to pay, and if then, in the judgment of the company it shall be prudent to pay — it shall be the pleasure of the company to pay — then it will pay; not out of anything that it has now, but out of its future earnings. Is that a dividend under this

122d section of the internal revenue law, due and payable to the stockholders as part of the earnings, profits, income or gains of the company, from which the company can deduct a tax, and as to which they can make a return on the tenth day of the month next succeeding that in which it becomes due and payable, and swear that the tax has been returned within that time, and is true and correct — true and faithful, in the language of the statute?

The insinuation was made below, and is repeated by the Attorney-General in his argument here, that the form of these certificates was devised for the purpose of evading two statutes, one a State law, by which the legislature reserved the right to reduce profits when they exceed ten per cent upon the capital actually expended, and the other, the United States internal revenue law, in regard to taxation. The absurdity of this insinuation appears by the following facts: The earnings referred to in the certificates as expended, form a part of the capital actually expended, and the dividends of the company have never, in any one year, exceeded ten per cent upon the capital so expended. All the dividends of the company during its whole existence, including this eighty per cent, and calling it a dividend in cash, would not give the stockholders a dividend of ten per cent during the existence of the company upon the nominal capital stock of the company, much less upon the capital actually expended, including the expenditure referred to in the certificates. The company was not liable to any tax upon the expenditure referred to in the certificates, under the internal revenue law, before the issue of the certificates. By their issue, if they are a dividend, the company has subjected itself to a tax upon the whole amount of the certificates. How idle then was it for the company to resort to this scheme for the purpose of evading taxation. No; these certificates bear their present form for legitimate and proper purposes; they speak for themselves, every word in them was used thoughtfully and carefully, and means something. The recital, "whereas this company has hitherto expended of its earnings" — that is, up to this time, during the whole existence of the company. There is nothing in this language which shows that the expenditure was all made as the assessor assumed in making his assessment during the life of the internal revenue law; nor that it was made proportionally according to time, there being expended each year, during the whole existence of the company, exactly the same amount as was expended every other year, as the commis-

sioner seems to have supposed when he decided to abate nine-fifteenths of the tax, because the company had been in existence fifteen years, nine of which was before the internal revenue law was enacted. The truth is, that the whole eighty per cent of the expenditure referred to in the certificates was made long before the internal revenue law was enacted.

The recital of the certificate proceeds: "For the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent of the capital stock of the company." The earnings were not on hand in money, or in any other shape capable of division, they had all been expended in constructing and equipping the road and in the purchase of other property which could not be divided without destroying the power of the company to earn anything. This is not only the evidence furnished by the certificate itself, but the testimony of the witness Worcester is to the same effect.

See his testimony on page 62 of record.

The recital proceeds, "and, whereas, the several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period." It does not say the stockholders are entitled to a dividend — it would have been folly to say that, for there was nothing to divide and no certainty that there ever would be anything to divide. It says they "are entitled to evidence of such expenditure;" this evidence the certificate furnishes. There is no danger in furnishing the evidence and it is right that it should be given. The certificate does not say that the stockholder is entitled to reimbursement now, but at some convenient future period. It would have been folly to talk of reimbursement now, there was nothing now with which reimbursement could be made. It would have been folly in the company to have promised reimbursement absolutely at any future period, because, then, these $23,036,000 of certificates would have been an absolute debt against the company, and might have swept all the property of the company away from its stockholders. There would have been no safety or propriety in making these certificates payable, except at a future period and also at a convenient future period, and also at the pleasure of the company, and so retaining in the company the power to judge, not only of the ability of the company to pay but of

the expediency of paying, having reference to all the other obligations and interests of the company. These certificates are, therefore, not only made payable at the pleasure of the company but out of its future earnings. There was nothing else with which they could be paid. The stock had all been issued and there was no money or other property on hand capable of division. The provision in the resolutions providing for a conversion of the certificates into stock whenever the company shall be authorized to increase its capital stock, also, prudently and properly reserves the right to the company to judge of the propriety of such conversion. The right is not given to each stockholder to demand stock instead of its certificates, even after authority has been given the company to increase its capital.

This court decided in the case of the United States v. The Baltimore and Ohio Railroad Company (17 Wallace, 322), that these taxes, imposed by said section 122, although assessed nominally upon the railroad companies were really taxes upon the stockholders. The facts of that case are as follows: The city of Baltimore had loaned the Baltimore and Ohio Railroad Company $5,000,000, and received from the railroad company as security for the loan, a mortgage on the road, revenue and franchises of the railroad company. The officers of the United States government claimed of the railroad company a tax of five per cent upon the interest paid on the loan. The company refused to pay, and this action was brought to recover the tax. The court decided that the company was not liable to the tax, upon the ground that the tax, although nominally levied against the company, was really a tax upon the creditor; and as the creditor in this case was a municipal corporation, it was not subject to taxation by the general government. Upon the theory of the law as held by this case, is it not unjust toward this defendant in error to compel it to pay a tax upon these interest certificates, before they become due? And if payment is compelled, and the company can in any way withhold the amount from its stockholders, will it not be unjust to the stockholders who may never realize payment on the certificates? Suppose the case of a stockholder owning $100,000 of the stock of the New York Central Railroad Company, and receiving $80,000 of these certificates on the 19th of December, 1868, has he an income of $80,000 for that year? And must he return it and pay tax upon it as

such? Is he worth one dollar more, after receiving the certificate, than he was before?

The Chicago, Burlington and Quincy Railroad Company v. Page, assessor, etc., 1 Bissell, 461.

This was a bill filed in the United States Circuit Court for the northern district of Illinois, to prevent the collection of a tax for $29,285 claimed to be due to the United States from the complainant under the 81st section of the internal revenue law of July 1, 1862.

12 U. S. Statutes at Large, 469.

The following is the head note of the case:

New certificates of stock — when not dividends.

1. Where a railroad company, from time to time, made advances from their surplus earnings to another railroad company, taking leases and mortgages therefor, and such second company finally became insolvent, and the loaning company, to secure their debt, foreclosed their mortgages and purchased the insolvent road for the amount of their advances, and issued stock certificates to each of their stockholders, representing their *pro rata* interest in this property thus acquired — all the said advances having been made prior to the passage of the act of July 1, 1862 — such certificates are not dividends within the meaning of section 81 of that act, and are not subject to the three per cent tax.

2. The advances having all been made prior to the passage of the act, and no money having been received at the sale, but the company having simply perfected their title and enforced a pre-existing lien, and having always treated this acquired property as added capital stock, such certificates are not properly dividends in money or scrip paid to the stockholders. (See remarks of Judge Drummond at pages 464 and 465.)

In support of the position taken in this point, the court is referred to two other authorities.

1st. The opinion of Walter H. Smith, then the solicitor of the internal revenue department of the government. Solicitor Smith was requested by the then commissioner of internal revenue to give his opinion as to the validity of the tax in question in this case, and on the 28th of February, 1871, he gave his opinion, of which the following is a copy:

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF INTERNAL REVENUE,
WASHINGTON, *February* 28, 1871.

SIR. — I have been requested by you to give my opinion as to the validity of an Internal Revenue Tax, assessed against The New York Central Railroad Company, on what is alleged to have been a scrip dividend.

I have given the case all the consideration that the limited time, since the argument and the pressure of other official duties, would permit.

The facts are as follows:

On the 19th day of December, 1868, The New York Central Railroad, by its duly authorized Board of Directors, adopted the following resolutions:

"*Whereas*, This company has hitherto expended of its earnings, for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent of the capital stock of the company; and, whereas, the several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period;

"Now, therefore, *Resolved*, that a certificate, signed by the president and treasurer of this company, be issued, to the stockholders, severally, declaring that such stockholder is entitled to eighty per cent of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, *at the option of the company, out of its future earnings*, with dividends thereon at the same rates and times as dividends shall be paid on the shares of the capital stock of the company, and that such certificates may be, *at the option of the company*, convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

"*Resolved*, that such certificate be delivered to the stockholders of the company, at the Union Trust Company, in the city of New York, on the presentation of their several certificates of stock, and that the receipt provided for in these resolutions shall be indorsed on the stock certificate."

Under the authority conferred by these resolutions, certain certificates were issued in the form following:

"THE NEW YORK CENTRAL RAILROAD COMPANY.

"*Interest Certificate.*

"No."

"Under a resolution of the Board of Directors of this company, passed December 19, 1868, of which the above is a copy, *The New York Central Railroad Company* hereby certifies that being the holder of shares of the capital stock of said company, is entitled to dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

"This certificate may be transferred on the books of the company on the surrender of this certificate.

"In witness whereof the said company has caused this certificate to be signed by its president and treasurer this 19th day of December, 1869.

"*President.*

"*Treasurer.*

"For a valuable consideration do hereby sell, assign and transfer all interest in the above certificates to and do hereby irrevocably appoint allowing to execute a transfer thereof on the books of the railroad company therein mentioned."

In May, 1869, the Legislature of New York legalized the issuing of these certificates, and authorized their conversion into stock of the company, but no such conversion has ever been made.

The capital stock of the company, at the time these resolutions were adopted, was $28,795,000, and for eighty per cent of the same, being $23,036,000, interest certificates, in the form above described, were issued.

The railroad company did not then have on hand, undisposed of, or otherwise, this sum of $23,036,000, nor did it then have on hand any other sum or fund which it intended or undertook to divide or distribute among its stockholders.

It appears, from the evidence in the case, that this railroad had been constructed prior to the year 1853, and that, from that time up to the issuing of these interest certificates, there had been a large advance in the value of the property owned by the company, consisting of real estate and other property; that a portion of this increase arose from the general enhancement of values created by the war, and the

general progress of the country, and a portion of it from improvements made by the company out of its earnings, such as double tracks, depot grounds and buildings, exchange of iron for steel rails, real estate purchased, etc., etc.

It is claimed by the company that their interest certificates were intended to represent this increase of value only, and that they did not represent any portion of the earnings of the company after July 1, 1862, the time when the Internal Revenue Law took effect.

In my opinion they were intended to represent and did represent the increased value of the property of the company, derived from *all sources*, including the earnings which accrued after July 1st, 1862, and had been applied on the road, as well as those which accrued prior to that date.

On the 3d day of March, 1870, the Assessor of Internal Revenue of the Fourteenth District of the State of New York made an assessment against this railroad company, founded on these interest certificates, and treating them as a *scrip dividend*.

This was an assessment of five per cent on $23,036,000, making a tax of $1,151,800. He added as penalty for failing to make return under section 122, $1,000. The entire assessment was $1,152,800.

It is the validity of this assessment that is now under consideration. Did the law authorize it? It is very clear that there was error in assessing the penalty of $1,000. That is not an assessable penalty, but one that can only be recovered by some appropriate suit or proceeding This portion, however, is so small in comparison with the remainder of the tax, as to sink into absolute insignificance.

The great question is as to the tax of $1,151,800. Was it in accordance with law?

If it were, it should be collected without hesitation or delay.

If it were not, it should not be enforced, no matter what may be the clamor or complaint of those not familiar with its merits.

The fact that the appellant is a wealthy railroad company, and, perhaps, a gigantic monopoly, should have no influence in the consideration of this question. It is entitled to the same consideration that an individual would be.

The only authority for this tax is found in section 122 of the act of June 30, 1864, as amended July 13, 1866.

That section is in these words:

"That any railroad, canal, turnpike, canal navigation or slack-water company, indebted for any money for which

bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared *any dividend in scrip or money*, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the *earnings, profits, income or gains* of such company *carried to the account of any fund or used for construction*, shall be subject to, and pay a tax of five per centum on the *amount of all such interest, or coupons, dividends* or profits, whenever and wherever the same shall be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all *payments* on account of any interest or coupons, and *dividends, due and payable*, as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend or interest, or coupons on the bonds or other evidence of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth of the month following that in which said interests, coupons or dividends *became due and payable*, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereunto a declaration of the president or treasurer of the company, under oath or affirmation, in form or manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or for the payment of the tax aforesaid, the company making such default shall forfeit as a penalty the sum of $1,000; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

It is very apparent that this case does not come under the first clause of this section, relating to interest or coupon. If included at all it must be under the clause that "any such (railroad) company that may have declared any dividend in *scrip or money* due or payable to its stockholders, * * * as part of the earnings, profits, income or gains

of such company, and all profits of such company carried to the account of any fund, or used for construction shall be subject to, and pay a tax of, five per centum on the amount of all such dividends or profits."

It is not "profits of such company carried to the account of any fund or used for construction."

It is not a dividend in "money." If anything it must be a "dividend in scrip." What is a "dividend in scrip?"

A dividend, in its ordinary signification, is a sum divided. Generally a sum of money that has been divided among certain parties. A "dividend in scrip," as used in this statute, is the setting apart of some portion of the "earnings, profits, income or gains" of such company among its stockholders, and giving them a written certificate or evidence of such setting apart, and promising them, at some time, to make payment of such sum.

The time when payment shall be made is not material, *provided there is an absolute promise to pay.*

The scrip, the writing, must impose upon the company the liability to pay, and give to the stockholder the right, at some period, to enforce the payment.

It must be such an instrument as would be the foundation of an action against the company in case it refuses to pay.

And I think it must be a promise to pay in money. The terms used plainly imply that *money* is the thing to be paid. The language is: "And said companies are hereby authorized to deduct and withhold, from all *payments* on account of *any dividends* due and payable as aforesaid, the tax of five per centum."

"And the *payment* of the amount of said tax so deducted from the dividends and certified by the president or treasurer of said company, shall discharge said company from that *amount* of the dividend, except where said companies may have contracted otherwise."

I have said that the scrip must be an absolute promise to pay. This is implied in the language employed. It does not even require a return of the dividend until the tenth day of the month following that in which the dividend *becomes due* and *payable.* "And a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which said interest, coupons or dividends *become due and payable.*"

In the case at bar, when do these dividends become *due and payable?* "At the pleasure of the company out of its future earnings." "At the option of the company out of its future earnings."

Non constat that it ever will be the "pleasure of the company," "the option of the company," to make payment. Perhaps I might say, *non constat* that there ever will be earnings sufficient to pay them. It is possible, although not probable, that there may be so many accidents and casualties connected with the road as to absorb all the net earnings.

The company have imposed no absolute liability upon themselves, except to pay *dividends* on their certificates at the same time, and at the same rates, that they do upon the capital stock.

They do not bind themselves even to declare any dividends on their capital stock. They have the legal power to absorb all the earnings of the road in laying another track, and in improving their own road, or perhaps in acquiring other roads; and if they should do this in good faith, the holders of these interest certificates cannot complain.

They have no power to compel the company at any time to make payment.

It may be said that this company have adopted this form of certificate for the very purpose of avoiding liability to the tax. If they have done it, even for that purpose, and the law does not impose a tax upon the transaction, as they have made it, there is no power to impose it. A party may make a verbal contract, instead of a written one, for the sole purpose of avoiding stamp duty on the writing, and yet I do not suppose that he thereby becomes liable to any stamp duty.

From an examination of the papers on file in this case, I am satisfied that this company has not paid the entire amount of tax due from it.

It has paid tax at five per cent upon all dividends received on these interest certificates. These dividends were four in number, and at four per cent.

It has not paid on certain moneys carried to the "sinking fund" and used in liquidating its liabilities, and certain moneys carried to "income" and "construction" accounts. It should be made to pay these taxes if it is not too late to enforce their payment; and if it is, it should be prosecuted for all specific penalties that the law has imposed for neglect to make returns.

Whenever any payment is made by the company on these certificates, then a tax will be due on such payment.

But until such payment is made on these certificates, I am of the opinion that the company is not liable for any tax on the same.

However, as the amount at stake is large, and I distrust

the accuracy of my own conclusions, and desire that the government should not suffer loss, I recommend that you delay the collection of this tax, and direct that a suit be brought upon this assessment in the proper United States court, and thereby obtain the judgment of the judiciary upon its validity, or that you cause a distraint to be made upon the property of the company, allow suit to be brought by the company against the collector, and defer the collection of the tax until such suit is finally determined.

By pursuing either of these courses the government will lose nothing. The company is abundantly able to pay. The tax will be on interest, and if it is finally adjudged to be valid, will doubtless be paid into the treasury.

Under all the circumstances, I deem it unadvisible to abate the tax.

I have the honor to be, very respectfully,

(Signed) WALTER H. SMITH.
Solicitor.

HON. A. PLEASANTON, *Commissioner.*

2d. The report of William Orten, John F. Smythe and Ralph P. Lathrop, commissioners appointed by the commissioner of internal revenue to examine and report in regard to the matter in controversy between the defendant in error and the government, growing out of the issue of these interest certificates. A copy of that report is annexed to the complaint in this action.

The court will observe that Solicitor Smith, after a full and careful examination of the question, expresses his opinion in the following language: "Whenever any payment is made by the company on these certificates, then a tax will be due on such payment. But until such payment is made on these certificates, I am of the opinion that the company is not liable to any tax on the same."

The court will also observe that said commissioners, in their report, express their opinion that "the distribution of these certificates did not create a liability to tax, and, therefore, that the company is not liable to the assessment from which it has appealed." (See record, page 20, fol. 30.)

The opinion of Solicitor Smith and the report of these commissioners, although not the decisions of courts, are entitled to weight with this court in the decision of this case, in view of the relations which said solicitor and commissioners held to the government.

Solicitor Smith was the proper law officer of the government to advise upon this question.

Mr. Orton, one of said commissioners, had held the office of commissioner of internal revenue, and was familiar with the law. Mr. Smythe, another of said commissioners, was then, and still is, postmaster at Albany, and had held the office of supervisor of internal revenue. Mr. Lathrop, the other of said commissioners, was the assessor by whom the assessment in question in this case was made, and is now United States collector for the district in which he lives.

2d. Assuming that the company was liable to taxation by reason of the issue of the interest certificates, the assessment of March 3d, 1870, was illegal and void, because it was not made according to the requirements of the internal revenue law, but in violation of it.

The company never supposed that it was liable to a tax on account of these certificates, and therefore made no return as to them. It did make returns while it was in existence as to four dividends, two upon the stock of the company, and two upon these very certificates. If these certificates were taxable, a return should have been made as to them, and each and all of those returns as to dividends, were imperfect and incomplete, and omitted something that they should have contained, and there was a default on the part of the company, in making return and paying tax. Yet the officers of the government received those returns as to dividends as perfect, and without objection; and assessed and collected the taxes on them as if they were regular and legal.

The aforesaid section, 122 of the internal revenue law, contains the following provision: "And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit, as a penalty, the sum of $1,000; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

The "provisions of law in other cases of neglect or refusal" will be found in sections 14, 19 and 20 of the internal revenue law as amended by chapter 184 of the Laws of 1866. These sections authorize and require assessors, before making an assessment, to summon persons liable to assessment before them to give testimony or answer interrogatories under oath or affirmation, respecting any objects liable to tax, or the lists, statements or returns thereof. They require the assessor to enter into and upon the premises of the person neglecting to make return, and make, according to the best information which he can obtain, including that derived from the evidence elicited by the examination of the assessor, and on his own view and information, such list or return of the object liable to tax. They require the assessor to give notice by advertisement in a newspaper, and by posting notices in at least four public places in his assessment district, and by mailing a copy of such notice to each postmaster in his district, to be posted in his office, stating the time and place when and where appeals will be received and determined relative to any erroneous assessment. They provide also, that in case any list shall be ascertained to be imperfect or incomplete in consequence of any omission, the assessor may, within fifteen months, enter on any monthly or special list the names of any persons as to whose returns there has been an omission; but the conduct of the assessor in this regard is regulated by that provision of said section twenty, in these words: "And all the provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, as may be necessary to the proceedings herein authorized and directed."

These provisions of the internal revenue law were intended by Congress to protect the citizen against taxation without a hearing, and in view of that provision of the Constitution which provides that "no person shall be deprived of property without due process of law." All of these provisions of the internal revenue law and that provision of the Constitution, as well as those other provisions of the internal revenue law, which provide that all penalties incurred shall be sued for in the name of the United States before any Circuit or District Court of the United States, where the penalty was incurred, were disregarded by the officers of the government in making this assessment. They seem to have seen $1,250,000 in the possession of a corporation, weak, because unpopular, and, therefore, without ceremony, without process, without observing any of the forms of law, without hearing, they reached out to seize it. The assessor

says, in his testimony in this case: "I made the assessment dated March 3, 1870, on the day it bears date, in my office; no one else was present; I ascertained the amount of the scrip dividend from an Assembly document; I did nothing in regard to said assessment, except to write the paper dated March 3, 1870, and to hand it the next day to the defendant, and serve the notices on Mr. Wendell, as I have before testified; no one of my assistant assessors ever did any act in regard to said scrip dividend."

See his testimony on page 47 of the record.

This case illustrates most forcibly the folly and the wrong which may be done by disregarding the law. If the assessor had summoned the company to appear and answer in regard to its liability to tax on account of these certificates; if he had made any inquiry, or taken any proceedings required of him by law for the ascertainment of the liability to tax, he would have been satisfied before making the assessment, as he was when he signed the report, as commissioner, with Mr. Orton and Mr. Smyth, in January, 1872, that "the distribution of these certificates did not create a liability to tax, and, therefore, that this company was not liable to the assessment from which it has appealed."

See his testimony on page 47 of record, and his report on page 20 of record.

If the commissioner of internal revenue or the supervisor of internal revenue, before peremptorily ordering this assessment had made inquiry for the ascertainment of liability to tax, they would have been satisfied, as the commissioner was afterward satisfied that at least nine-fifteenths of the tax was illegal.

If any opportunity had been given to the company before the assessment, it would have proven, to the satisfaction of the officer of the government, that the whole amount of earnings referred to in the certificate had been expended long before the internal revenue law was passed; and that, therefore, as well as for many other reasons, the company was not liable to taxation on account of the certificates.

3d. The seizures, sales and enforced payments made by the collector from the defendant in error were illegal for the following reasons: 1*st. Because the pretended assessment on which, solely, they were founded was illegal and void upon its face.* 2*d. Because the collector had no other paper or authority for such seizures, sales and enforced payments than said pretended assessment.* 3*d. Because such seizures, sales and enforced payments were made out of the property of the defendant in error against whom no assessment had been made, and on whose property no lien existed.* 4*th. The collector gave no notice and made no demand of the tax before distraint and sale.*

See his testimony at pages 47 to 58 of record.

The assessment, after reciting that "the New York Central Railroad Company" had "failed to make return," assessed "against the president, directors and company of the New York Central Railroad,"

Tax	$1,151,800
Penalty	1,000
Amount of tax	$1,152,800

Under this assessment the collector seized and sold property of the New York Central and Hudson River Railroad Company.

Section 28 of the internal revenue law, as amended by chapter 124, provides that it shall be the duty of the collector, in person or by deputy, to issue to the person assessed a notice, to be left at his dwelling or usual place of business, demanding payment of the tax; and if the tax is not paid, and he proceeds to distrain for its collection, it is made his duty to cause an account of the goods or effects distrained to be made, and a copy thereof, signed by the officer making such distraint, to be left with the owner or possessor of such goods or effects at his or her dwelling or usual place of business, with a note of the sum demanded and the time and place of sale. Neither of these notices was given to the defendant in error.

4th. The court decided coreectly in rejecting the additional statements offered at pages 69 and 70, of the record.

The thirty-first section of the general railroad law of the State of New York, passed April 2, 1850, requires railroad companies to report annually to the State Engineer and Surveyor, as to certain matters which are specified in that section, and provides how the report shall be verified. These additional statements, offered in evidence are no part of the matters required to be reported by law. They are not part of the reports and are not signed or verified. They have not even the force of an admission made by an officer of a company out of the line of his duty, because it does not appear that these additional statements were signed or made by an officer of the company. Again, suppose they were a part of the reports and showed moneys carried to transportation account and invested in construction, or in the purchase of additional property; they would still be immaterial and incompetent, as evidence in this case. They would not tend to show that the certificates were a dividend in scrip, and taxable as such. The assessment in this case was on account of the issue of the interest certificates as a scrip dividend; it was not for profits carried to the account of any fund, or used for construction. That was not the issue made or tried in this case.

5th. At folio 115 *of the record, the counsel for the defendant offered to read from the report of the New York Central Railroad, for the year* 1869, *and from the reports of the plaintiff for the years* 1870, 1871 *and* 1872, *for the purpose of showing that the interest certificates were merged in the capital stock of this plaintiff in the year* 1872, *and that dividends were declared, and paid on such interest certificates in* 1869, 1870 *and* 1871, *the same as upon the capital stock.*

The counsel for the plaintiff objected to the introduction of said evidence, upon the ground that it was immaterial, what was done with said interest certificates after they were issued; that the question was, whether they were taxable by their character and the circumstances existing at the time they were issued, and that such evidence was incompetent and immaterial.

The court sustained the objection, and the counsel for the defendant excepted to such ruling.

"*The court further remarked, that the reports of the New York Central Railroad Company previous to* 1869, *were admitted in evidence, upon the statement of the counsel for the defendant, that his object in offering them was to show what portion of the earnings referred to in said interest certificates had been realized since the internal revenue law went into operation.*"

The court decided correctly in excluding said evidence.

The seventeenth section of the act to reduce internal taxes and for other purposes, passed July 14, 1870, provided, that after August 1, 1870, no further taxes shall be levied or assessed under the aforesaid section 122. It is therefore wholly immaterial in this case, what was done with the certificates in 1872, two years after the internal revenue law had ceased to operate. Even if that section 122 had not been repealed, it would be immaterial in this case to show that they had been converted into stock. Such act of conversion does not in any respect change, or affect the character of the original transaction in issuing the certificates. If dividends were paid upon them, if the certificates were paid in full, while the internal revenue law was in operation, such payments would be taxable. And it was proven that taxes were paid on such dividends as were made while the internal revenue law was in operation. But such dividends or conversion into stock, does not change the character of the original transaction, nor make that taxable which otherwise is not.

The evidence is not competent, in the view of the attorney-general, as calculated to throw light upon the transaction of 19th December, 1868. What light can such conversion throw upon the meaning of that transaction? It cannot change the meaning as expressed in the certificates. But if it showed, conclusively, that the directors of the company, when they passed the resolutions of the 19th of December, 1868, intended to convert the certificates into stock, or meant to pay them at some future day, that does not change the character of the original transaction. Until such conversion or payment, no liability to tax has been incurred.

6th. At folio 126 *of the record, the counsel for the plaintiff in error, at the end of the long written opinion of the judge, and referring to that opinion and decision, takes an exception, in the following language: "To which ruling and decision of the court, to wit, that the New York Central Railroad Company did not declare a dividend in scrip, by the issue of the so-called interest certificates of December* 19, 1868, *within the meaning of section* 122 *of the internal revenue law referred to, the counsel for the defendant then and there duly excepted."*

No such remark as that specified and excepted to, will be found in the decision of the judge. His conclusion and decision was, "that the tax was erroneously assessed, and the defendant must pay the amount realized by his proceedings." Not only because the certificates were not a dividend, but because of other irregularities, and illegality in the proceedings to collect the money. The exception, therefore, is too general to be available. But if specific, and it shall appear that the decision of the judge was, that "the New York Central Railroad Company did not declare a dividend in scrip, by the issue of the so-called interest certificates of December 19, 1868, *within the meaning of section* 122 *of the internal revenue law referred to," still his decision is correct.*

See first point above.

7th. The court decided correctly in directing a verdict for the plaintiff.

See all of the above points.

The counsel for the defendant in error makes the following answer to the argument of the Attorney-General, in behalf of the plaintiff in error:

The Attorney-General begins his discussion of his first assignment of error by saying that "the important point" is, "the meaning of the transaction of December, 1868." The counsel for the defendant in error does not understand that there is any such "point" in the case. The "transaction of December, 1868," was certain resolutions of the board of directors of the New York Central Railroad Company

authorizing the interest certificates. The resolutions prescribe the form of the certificate, and the resolutions and certificate refer to each other, and all together make the certificate. The whole resolutions and certificate are expressed in plain ordinary language, without technical terms or ambiguity, and tell, without doubt or chance of mistake, what was the "transaction of December, 1868."

The Attorney-General says, also: "Any subsequent dealing of the parties thereto" [the transaction of December, 1868], "calculated to throw light thereupon, is competent evidence of such meaning and is one of the ordinary instruments of proof." The counsel for the defendant in error understands the rule to be that extraneous evidence — evidence of cotemporaneous or subsequent conduct — is admissible only for the purpose of ascertaining the meaning of *ambiguous* language — to throw light where it is dark — to make certain that which is uncertain. Such evidence is never admissible for the purpose of explaining what is already clear. When such evidence is offered to explain language which expresses the transaction clearly, it is always rejected because its tendency is to confuse and contradict and vary the meaning intended by the actors in the transaction. This case illustrates the propriety of the rule excluding such evidence in such cases. The Attorney-General contends that the evidence offered would tend to show that the directors, by their resolutions of December, 1868, meant to give something in the nature of stock — something that would give the holders of the certificates an interest in the present property of the company, as well as an interest in its future earnings, and so contradict and vary the plain purport and meaning of the resolutions.

Moreover, the evidence was not offered at the trial for the purpose of "throwing light upon" or illustrating "the transaction of December, 1868." The whole struggle, on the part of the plaintiff in error, at the trial, was to satisfy the court as to the *effect* of that transaction — that its *effect* was to make a dividend in scrip, within the meaning of section 122 of the internal revenue law.

The evidence was not offered at the trial for the purpose for which the Attorney-General here insists that it was admissible. At the trial it was offered "for the purpose of showing that the interest certificates were merged in the capital stock of this plaintiff, in the year 1872, and that dividends were declared and paid on such interest certificates in 1869, 1870 and 1871, the same as upon the capital stock,"

and the evidence was objected to "upon the ground that it was immaterial what was done with said interest certificates after they were issued; that the question was whether they were taxable by their character and the circumstances existing at the time they were issued, and that said evidence was incompetent and immaterial."

See record, folio 115.

Moreover, again assuming that extraneous evidence would be admissible to explain that which is already clear and needs no explanation, the evidence offered does not tend to "explain the meaning of the transaction of December, 1868."

That transaction was the act of the directors of The New York Central Railroad Company.

During the three years and more between December, 1868, and 1872, a great many changes had taken place, and a great many things had been done which had utterly changed the circumstances existing and the men acting in December, 1868. Among other things that had been done, the legislature of the State of New York had passed a general consolidation act. (*See it at page forty-one of record.*)

Under the authority given by the second section of that act, the directors of The New York Central Railroad Company had entered into a "joint agreement" with the directors of another company (the Hudson River Railroad Company), by which provision was made, not only for the disposition of these interest certificates but also for the disposition of all the other obligations, and of all of the stock and property and affairs of both companies, and naming the new company and its directors and other officers, and the amount and number of the shares of its capital stock, and many other details. (*See record, fol.* 74.)

It does not appear that any one of the directors of the plaintiff in 1872 was an actor in the "transaction of 1868," and the truth is, that nine of the whole thirteen were not.

How then can it be argued, with any propriety, that the conversion of the certificates by plaintiff's directors into plaintiff's stock in 1872, two years after the internal revenue law had ceased to act in any way, tends to throw light on a transaction by other actors and under other circumstances three years before? *Weisenberger et al.* v. *Ins. Co.*, (56 *Penn. St. R.*, 442,) holds that the words "This policy does not attach to oil in the tanks," cannot be explained by extrinsic testimony, because they are not ambiguous.

The Attorney-General, at the commencement of his discussion of his second assignment of error, seems to have fallen into an error in supposing that the counsel for the defendant in error, insisted or admitted below that the transaction of December, 1868, was "a scheme devised in evasion of a statute," and "that upon its face the above certificate was shaped, in order to evade at once a New York statute, which allows the legislature to intervene, in case the dividends of a corporation exceed ten per cent, and the United States revenue statute upon dividends in scrip;" and that as the scheme was a successful evasion, it was not, therefore, taxable.

The counsel for the defendant below never made any such statement or admission. The defendant in error has never, anywhere, by itself or by its counsel or agent made any such avowal.

The counsel for the plaintiff in error, by insinuation, not directly, charged that such was the object of the transaction of December, 1868. But the counsel for the defendant in error then, as the defendant has at all other times, denied the charge, and the absurdity of it is shown before in this argument. The scheme did not evade the law of New York; it did not evade but encountered the United States law. Hence all this controversy.

The Attorney-General further on, in his argument, seems to suppose that the transaction of December, 1868, as it is insisted to be, by the defendant in error, is a "vanishing substance," and that no argument can support it.

The counsel for the defendant in error believes that the transaction of December, 1868, was a thing of substance and not unlawful or improper in any sense, but both lawful and proper.

It gave to the holders of the certificates authorized by it, a *right* to participate ratably with the stockholders in dividends thereafter made of profits thereafter earned. That *right*, the holders of the certificates can enforce by actions at law; and it gives to the certificates a substantial value — a value almost, not quite, equal to the stock certificates.

The holders of them can judge as well as the holders of the stock certificates of the prospects of the company, as to earning dividends, and they know that when earned and made, they will participate. The certificates were valuable as soon as issued; and by the amount of their value they subtracted from the value of the stock certificates, because, by and through them, a portion of the future earnings of the

company were thereafter to be diverted from the stockholders to the certificate holders. The holders of the certificates did not it is true, under the certificates, take any interest in the *present* property of the company. They would not, under them, be entitled to participate in a division of the property of the company in the event of its dissolution; but still the certificates were things of substantial value, not a vanity nor a "vanishing substance."

The Attorney-General further along in his argument says, that the company owes to each certificate holder "a duty arising out of the nature of the transaction" [of December, 1868], "a duty which is, indeed, not technically a *debt* or an *absolute* implied assumpsit, but is of like sort with that implied in behalf of those who hold stock, viz.; That, at all events, he shall have a pro rata share in the distribution of whatever assets may remain at the dissolutial of the company."

The counsel for the defendant in error is unable to see what value this right suggested by the Attorney-General for the certificate holder, to share in the distribution of the assets of the company at its dissolution, is, if it cannot be enforced either as a debt or under an implied assumpsit.

But can the Attorney-General be right in saying that the certificate-holders have a right to share with the stockholders in a division of the property of the company at its dissolution? If so, then the transaction of December, 1868, increased the capital stock of the company by the amount of the certificates, and made it $51,831,000 instead of $28,795,000, and increased the number of the shares of the capital stock from 287,950 to 518,310, and that not only without authority of law but against law. Each holder of one share of the stock of the company on the 19th of December, 1868, owned $\frac{1}{287,950}$ of the property of the company. When he had received his certificate for eighty dollars, and sold it, did he sell any part of his interest in the property of the company? Did he sell eight-eighteenths of his interest in all the property of the company as well as eight-eighteenths of his interest in any dividends that might thereafter be made of the future earnings of the company? If he did, then, indeed, the transaction of December, 1868, was not only different from what its actors intended it to be, but also different from what they described it to be, by the language in which they made the transaction. If that was the effect of the transaction, then it became possible by it (there being only 287,950 owners of an interest in the

property of the company, each equal with each one of all the others), that there might be 518,310 such owners.

Before giving such effect to the transaction, the court will require the Attorney-General to show the statute on which he relies for such startling effects.

The ninth section of the general railroad law of New York, before referred to, authorizes an increase of capital on vote of two-thirds of the stockholders "when it is found that the capital is insufficient for constructing or operating the road." No such increase was ever authorized. The legislature is the only power that can authorize an increase of capital for converting the certificates. Such authority was given, but there is no evidence that it was ever used, and, the truth is, it never was used. Under the Consolidation Act which was used the company could do all it required, and the other act became a dead letter.

The argument of the Attorney-General will be dismissed by the following comments upon the authorities he cites and relies upon: One of the authorities which he cites is *Van Allen* v. *The Assessors* (3 *Wal.*, 584). Van Allen owned fifty shares of the stock of the First National Bank of Albany, and was assessed upon it under a State law, which authorized the assessment of the individual stockholders upon their shares of stock. He resisted the tax upon the ground that as the whole capital of the bank was invested in United States government securities, which by act of Congress were exempted from State taxation, the State law was unconstitutional. The State courts held the tax legal, and this court held also that States had *power* to tax shares of bank stock, although the whole capital was invested in United States government securities. Judge Nelson, in giving the opinion of the court, states the familiar doctrine that the legal title to the property in a corporation is in the corporation; and he cites an English case in which the court held that under the law of England, requiring vessels to be registered in the names of their owners, a vessel owned by a corporation must be registered in the name of the corporation, and not in the names of all of the stockholders. The Attorney-General cites this case from 3 Wallace, for the purpose of showing that the legal title to the property of a corporation is in the corporation. No one will ever pretend otherwise. Of course, the legal title is in the corporation. The property is to be protected and cared for, registered and insured by the corporation, and in its name. All this is true, and yet it is also true that the stockholders of a corporation are the real, substantial, ultimate owners of its property. They contributed

of their several individual properties to the property of the corporation at its organization. They really and substantially manage the corporation while it exists. They elect the agents who direct the management. They share in the profits and in the distribution at dissolution. This court, therefore, holds in this very case of Van Allen v. Assessors, that the interest of a shareholder in the property of a corporation is a distinct and independent interest, held by him as he holds his other property, and that a tax on the shares of a corporation is not a tax on its capital. The same doctrine was again held by this court at the present term in the case of *Hepburn* v. *The School Directors of Carlisle.* A stockholder, in a corporation, has an interest in its property which he can have protected against the corporation itself. If the interest certificates in question gave to their holders an interest in the property of the company, as the Attorney-General says they did, then the holders of these certificates have also a right to a voice in the management of that property, if not by vote in the election of directors, at least through legal proceedings to restrain waste and fraud and illegality in the management. Clearly, the certificates cannot be read so as to give any such right. That right remains solely with the stockholders.

Another authority cited by the Attorney-General is Frazer et al. v. Siebern, Auditor, and Nixon, Treasurer, of Hamilton County, 16 Ohio St., 614.

This case is similar to Van Allen v. Assessors, and was decided upon the authority of that case.

The plaintiffs were shareholders in the First National Bank of Cincinnati, and were assessed under a statute of Ohio. The action was brought to restrain the collection of the tax, on the ground that it was assessed in violation of the two limitations in the act of Congress. The court below held that the tax was legally assessed. The court above, in the case above cited, held that the tax was illegal, because the State statutes authorizing the tax on bank shares were in violation of the limitations in the act of Congress. But, the court also holds, at page 620, as this court did in the case of Van Allen v. Assessors, that the word "shares," as used in the act of Congress, was used "in the sense of *choses*, and not as *aliquot parts of the capital stock* of the association. It was used to designate the *separate* and *individual* property of the owners, and not their interest in the *common* property of the bank."

The definition of a share of stock quoted by the Attorney-General, from Angell and Ames, does not embrace all the

essential characteristics of stock. It omits to notice the right to participate at dissolution. That is the right of a shareholder. It is not the right of a holder of one of the interest certificates in question.

Another authority cited by the Attorney-General, is *The Mechanics' Bank* v. *The N. Y., N. H. R. R. Co.*, 3 *Kernan*, 627.

The capital of the railroad company was limited to $3,000,000, and was all issued. The by-laws of the company required that transfers of stock, should be made on the transfer books of the company, and that old certificates should be surrendered before new ones were issued. The company appointed as its transfer agent Schuyler, its president, who fraudulently issued a certificate for eighty-five shares of stock to one Kyle, who owned no stock. The bank made a loan to Kyle, on a pledge of this fraudulent certificate as security, and requested the railroad company to transfer the stock on the books of the railroad company, which was refused and the action was brought to recover the value of the stock. *Held*, that the certificate was void; that the bank acquired by it no title to any stock; that the railroad company was not liable to the bank for damages; that the certificate is not like negotiable paper, and a *bona fide* assignee takes subject to equities against assignor.

The Attorney-General quotes from the opinion of Judge Comstock, in the above case, the following language. "Certificates of stock are simply muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member," and adds his own remark as follows. "We take it that this means evidence to *affect persons outside of the corporation*, as the corporation and its stockholders hardly need such evidence, having in their hands already the original documents (*i. e.*, the corporation books and papers), from which the certificate is, as it were, only a deduction."

The Attorney-General cites also for the purpose of susatining his position that the certificate of stock is "*evidence only to affect persons outside the corporation*," the case of *The Agricultural Bank* v. *Burr*, 24 *Maine*, 256. That was an action on a note given the bank in payment for stock of the bank. The stock had been assigned to the defendants upon the books of the bank but no certificate of stock had been issued. The defendants alleged that, as they had received no certificate they were not stockholders and the note was without consideration, but the court *held*, that "A person becomes legally entitled to shares by having them trans

ferred to him on the books of the bank. The certificate is but additional evidence of his title."

The counsel for the defendant in error understands that certificates of stock are evidence *for the corporation* as well as for those outside. How can the treasurer of a railroad company know that the person asking a transfer of stock is the stockholder whose name appears on the books of the company, unless he brings his certificate? That is additional and useful evidence.

In the case cited by the Attorney-General, the certificate was of no use to the outside party, because the court held that, although the certificate was signed by the proper officers of the railroad company, and had every appearance of having been issued by the company, still it was void, and the bank acquired no rights under it.

The case of *Minot* v. *Paine*, 99 *Mass.*, 101, cited by the Attorney-General, was this:

Minot, as trustee, held 200 shares of the stock of the Chicago, Burlington and Quincy Railroad Company, and ten shares of the stock of the Western Railroad Company. It was the duty of the trustee to pay the income of the fund to Mrs. Paine during her life, and the principal, after her death, to others named.

The directors of the Chicago, Burlington and Quincy Railroad Company voted to distribute to stockholders one new share for five of old stock, "to represent improvements on the road, construction of the Burlington bridge," etc.

The directors of the Western Railroad corporation voted to give three new to ten old shares, on the ground that "the large contingent fund of the corporation which, to a great extent, had already gone into the construction of the road, the virtual extinguishment of the debt of $1,000,000 to the city of Albany by the sinking fund provided for its payment, and other considerations, justify the distribution of 20,000 new shares to the stockholders."

The question submitted to the court was, whether these new shares were income or capital, and the court held that they were capital; that the investment of income in permanent improvements made the improvements capital belonging to the legatees in remainder, and that the distribution of new shares to represent these improvements did not change the character of the investment from capital to income.

Both of these corporations were authorized to increase their capital stock.

This case, as well as the following one, cited from 100 Mass., prove that dividends, payable in stock and based on expenditure of earnings in permanent improvements, are not dividends of earnings, but of that which had become capital, and that they are not realized by the stockholder until paid.

The head-note of the case of the *Boston and Lowell R. R. Co.* v. *Commonwealth*, 100 *Mass.*, 399, cited by the Attorney-General, reads:

"A corporation having reserved profits to an amount exceeding twenty per cent of its capital, and having authority to create additional stock, declared a dividend of twenty per cent on its existing shares, payable in six years to their then holders, either in money or stock, at the option of the corporation, interest thereon to be paid meanwhile on a certain day in each year to the holders on that day."

This privilege of a dividend in six years added to the market value of the shares.

Held, that this addition to the market value might be considered by the tax commissioner in estimating the fair cash value of the franchise; that the dividend, although declared, is not the property of the individual stockholder until due, and that, until then, he cannot be taxed for it, but it must, till due, be taxed as a part of the property of the corporation.

The head-note of the case of *Brown et al.* v. *The Lehigh Coal and Navigation Company, reported in* 49 *Penn.*, 270, reads:

"A corporation restricted to six per cent dividends out of profits to stockholders, on the basis of an increased business and enhanced value of the works and property, in accordance with a resolution of stockholders, issued scrip certificates from time to time entitling the holder to additional shares of stock, distributing them ratably among share and scripholders, in proportion to amount held at the date of the issue; the resolution, embodied in the scrip, providing that the scrip should not be entitled to any *cash dividend until* the funded debt of the company should be paid off, or adequate provision made for its discharge when due, and payment demanded, nor until conversion of said scrip into stock. After conversion, certain of the scripholders, demanding, by bill in equity, the back dividends which had been declared on the stock from the issue to the date of conversion, it was *held*,

1. That the rights of the scripholders were measured by

the contract under which it was issued, of which the scrip alone was the evidence; and,

2. That the contract was but an engagement that the holders of the scrip might become shareholders after payment of the funded debt or provision made therefor; and,

3. That, therefore, the scripholders were not entitled to dividends upon the scrip, nor on the stock into which it had been converted, except on such as had been declared subsequent to such conversion.

The following is a copy of the scrip:

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LEHIGH COAL AND NAVIGATION COMPANY.

MAY 1st, 1855.

Scrip for Shares.

Scrip Certificate No.

Dated 186 .

Certifying that heirs or assigns will be entitled upon surrender of this certificate to shares in the capital stock of the Lehigh Coal and Navigation Company, so soon as the present funded debt of the company has been paid off, or adequate provision made for its discharge when due and payment demanded; and will also be entitled to a *pro rata* share of any future distribution of scrip, but not to any cash dividend until this certificate has been converted into stock as above provided. This certificate may, at any time, at the option of the holder thereof, be converted into stock, on payment by said holder, either in cash or in the six per cent loans of the company, of the par value of said stock and the surrender of this certificate.

Transferable only at the office of the Company.

Philadelphia, 186 .

Received certificate.

Incorporated February 13, 1822.

LEHIGH COAL AND NAVIGATION COMPANY.

MAY 1st, A. D., 1855.

No. SCRIP. Shares.

This is to certify that heirs or assigns will be entitled, upon the surrender of this certificate, to shares in the capital stock of the Lehigh Coal and Navigation Company, so soon as the present funded debt of the Company has been paid off, or adequate provision made for its discharge, when due and payment demanded, and will also be entitled to a *pro rata* share of any further distribution of scrip, but not to any cash dividend, until this certificate has been converted into stock, as above provided.

Or this certificate may, at any time, at the option of the holder thereof, be converted into stock, upon payment by said holder, either in cash or in the six per cent loans of the Company, of the par value of said stock, and the surrender of this certificate.

This certificate is transferable only at the office of the Company.

Witness the corporate seal of the Company, and the signatures of the President and Secretary, affixed at Philadelphia the day of , A. D., 18 .

President.

Secretary.

Shares, $50 each.

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This case is authority against the position taken by the Attorney-General, that the interest certificates give to these holders a right to "a pro rata share in the distribution of whatever assets may remain at the dissolution of the company."

It is also authority against the other position of the Attorney-General, that the reports of the company are admissible in evidence to show the meaning of the interest certificates.

The head-note of the *Lehigh Crane Iron Company* v. *The Commonwealth*, 55 *Penn.*, 448, reads: "A corporation began with a capital of $100,000 which was increased to $1,000,000 out of its profits, the increase being invested in improvements, but the increase was not formally divided among the stockholders; *held*, the $900,000 increase was liable to taxation."

The action was brought to recover the State tax under a statute of the State which provided "that the tax *chargeable on the capital stock* on which a dividend or profit shall be made and declared of six per cent or more, shall be one-half mill on each one per cent of such dividend or profit."

The $900,000 of profits had been added to capital and a dividend of six per cent paid on the whole increase.

Another authority cited by the Attorney-General is The State of Ohio v. The Farmers' Bank of Canton, 11 Ohio, 94.

A statute of Ohio imposed a tax of five per cent on all dividends by bank, insurance and bridge companies. The defendant in this case made four dividends out of its profits, which were applied in payment of stock of the bank held by its stockholders. The question in this case was whether these four dividends were taxable. The court, in giving its opinion, use this language:

"Now, dividends, in a bank, under the laws above cited, consist of that portion of its profits which the directors separate from the general stock, and apply to the benefit of the stockholders. Whenever, by the act of the directors, the ownership of profits is so changed that it ceases to be the property of the corporation, and becomes the property of the stockholder, it is a dividend of profits, upon which the tax was intended to apply. The application of the profits, in this case, to the shares, which are the property of the stockholder, is plainly a dividend, within this definition, and the neglect of furnishing the statement is an act incurring the penalty."

This language does not describe the effect of the interest certificates in question in this case.

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